UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

REGAL-BELOIT CORPORATION; Victory Fireworks, Inc.; PICC Property & Casualty Company Limited Shanghai Branch; Royal Sun Alliance Insurance Co. Ltd., Plaintiffs-Appellants,

v.

KAWASAKI KISEN KAISHA LTD.; K-Line America, Inc.; Union Pacific Railroad Company, Defendants-Appellees.

No. 06-56831

Argued and Submitted: June 1, 2008.
Filed: Feb. 17, 2009.

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557 F.3d 985

Appeal from the United States District Court for the Central District of California, Dale S. Fischer, District Judge, Presiding. D.C. No. CV-06-03016-DSF.

Before: STEPHEN TROTT, SIDNEY R. THOMAS and RAYMOND C. FISHER, Circuit Judges.

ORDER

The opinion filed February 4, 2009 is withdrawn.

OPINION

FISHER, Circuit Judge:

This case requires us to determine which federal statute governs "a maritime case about a train wreck," where the parties' agreement for carriage of goods from China into the United States by sea and then by rail included a Tokyo forum selection clause that would violate one federal law, but would be enforceable under another. *See Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004). Regal-Beloit and several other named plaintiffs contracted with defendant Kawasaki Kisen Kaisha, Ltd. ("K-line") to ship their goods from China to various American Midwestern destinations via the Port of Long Beach in California.[1] K-line issued a through bill of lading to each shipper to cover the shipment from China all the way to the inland destinations, designating the Carriage of Goods by Sea Act as the law to govern the carriers' responsibility during the entire shipment.

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[1] Plaintiffs in this case include the following parties: Regal-Beloit is a non-California corporation with an office in Beloit, Wisconsin that purchased a cargo of electric motors to be shipped from Shanghai, China to Indianapolis, Indiana; Victory is a corporation authorized to do business in California with an office in Ellsworth, Wisconsin that purchased a cargo of fireworks to be shipped from Beihai, China to Minneapolis, Minnesota; PICC is a foreign insurance corporation with an office in Shanghai that was the subrogated insurer of a cargo of electric motor parts to be shipped from Shanghai, China to Milwaukee, Wisconsin; and Royal & Sun was the subrogated insurer of a cargo of retainer nail castings to be shipped from Zhangjiagang, China to Chicago, Illinois. Actions brought by the above plaintiffs were consolidated under Regal-Beloit's named complaint on August 7, 2006. All shipments entered the United States via the Port of Long Beach. We generally refer to the plaintiffs collectively as "Plaintiffs." We also generally refer to defendants Kawasaki Kisen Kaisha, Kline America and Union Pacific Railroad Company as "Defendants."

Although K-line's own ocean liner carried the goods from China to Long Beach, its United States agent, K-line America ("KAM"), subcontracted with United Pacific Railroad Company ("UPRR") to transport these goods from Long Beach to the inland destinations. K-line is KAM's corporate parent, handling its domestic business dealings through KAM, including dispatching and receiving vessels and negotiating its inland shipping with domestic carriers like UPRR. Plaintiffs' cargo was allegedly damaged when UPRR's train derailed in Oklahoma. Plaintiffs filed a breach of contract suit against Defendants in California Superior Court. After UPRR removed the case to the district court, K-line and KAM moved to dismiss under the Tokyo forum selection clause in K-line's initial agreement with Plaintiffs. The district court granted the motion to dismiss, determining that the parties successfully avoided the strict venue limitations that apply by default to the rail portions of these shipments as a matter of federal law under the Carmack Amendment. The dismissal provides us jurisdiction under 28 U.S.C. § 1291.

The outcome of this case turns on the answers to two questions, the *first* being which statutory framework should apply: the Carmack Amendment ("Carmack"), which provides the default rules governing the inland rail leg of a shipment between a foreign country and a point in the United States, or the Carriage of Goods by Sea Act ("COGSA"), which is what the parties contractually agreed would govern?[2]

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[2] Carmack has been codified at several different sections of Title 49 since its enactments. "Originally codified at 49 U.S.C. § 20(11), Carmack was recodified in 1978 at 49 U.S.C. § 11707 and then recodified again in 1996 at 49 U.S.C. § 14706. The current version of Carmack is codified at 49 U.S.C. § 11706." *Sompo Japan Ins.*

A reasonable forum selection clause typically is enforceable under COGSA, but such a clause is valid under Carmack *only* if the parties fulfill one of Carmack's two statutory methods for contracting out of the statute's venue restrictions. Applying this circuit's precedent dictates that contractually extending COGSA to the inland rail leg cannot trump the statutory force of Carmack's default responsibility regime unless the parties properly agree to opt out of Carmack and thereby remove the statutory barrier to choosing COGSA as the governing law. We therefore reach a *second* question: which of Carmack's two statutory opt out provisions applies to a contract for rail service that, like the contract here, has been exempted from regulation by the Surface Transportation Board? Unlike the district court, we conclude that the applicable requirements for opting out of Carmack are found in 49 U.S.C. § 10502, instead of § 10709. We thus reverse and remand to the district court to determine whether the parties contracted out of Carmack's venue restrictions under § 10502 so as to make the Tokyo forum selection clause valid and enforceable.

BACKGROUND

To ship their goods, Plaintiffs each entered into an intermodal through bill of lading with K-line that covered the entire transport from China to the

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Co. v. Norfolk S. Ry. Co., 540 F.Supp.2d 486, 492 n. 4 (S.D.N.Y.2008) [hereinafter *Sompo II*] (internal citations omitted). COGSA was enacted in 1936 and amended § 25 of former Title 49. In 1981, it was codified as amended as an appendix to Title 46 at 46 U.S.C. §§ 1301-1315. Congress recodified portions of Title 46 of the United States Code as positive law in October 2006, and COGSA is now located in the notes section of 46 U.S.C. § 30701.

Midwest.[3] In pertinent part, the bills of lading included the following provisions:

> 1. **(Definitions & Tariff)** ... (b) 'Carrier' means [K-line], her owners, operators and charterers whether acting as carrier or bailee .... (d) 'Connecting Carrier' means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading .... (j) 'Vessel' includes the vessel named on the face hereof, any vessel, lighter, barge, ship, watercraft or any other means of water transport and any other vessel owned, operated, chartered or employed (in whole or in part) by Carrier or any Connecting Carrier and used in whole or in part for carriage of Goods under this Bill of Lading.
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> 2. **(Governing Law and Jurisdiction)** The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consents.
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[3] A bill of lading is a contract that "records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract for carriage." *Kirby*, 543 U.S. at 18-19, 125 S.Ct. 385. "Through" bills of lading specifically cover both oceanic and inland legs of a journey in a single document. *See id.* at 25-26, 125 S.Ct. 385. "Intermodal" refers to the use of more than one method of transport during a single shipment. *See id.* at 25, 125 S.Ct. 385.

4. **(Responsibility for Shipments To, From or Through U.S. Territories)** (1) With respect to Goods shipped to, from, or through U.S. Territories, Carrier's responsibilities during the entire period (and not just during Water Carriage) from the time of receipt of Goods to the time of delivery of Goods shall be governed by [COGSA] and [COGSA] shall be deemed incorporated herein during the entire aforesaid period .... [4]

5. **(Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s))** (1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier.... (2) ... [E]very such vessel and Such Participant(s) shall have the benefit of all provisions herein benefiting [sic] Carrier as if such provisions were expressly for their benefit; and, in entering into this contract, Carrier, to the extent of those provisions, does so not only on its own behalf, but also as agent and trustee for such vessel and Participant(s).[5]

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[4] A clause such as this, "which identifies the law that will govern the rights and liabilities of all parties to the bill of lading," is often referred to as a "clause paramount." *Sompo Japan Ins. Co. of Am. v. Union Pac. R.R. Co.*, 456 F.3d 54, 56 (2nd Cir.2006) [hereinafter *Sompo I*].

[5] A clause such as this, which extends a bill of lading's defenses and limitations to downstream parties who have subcontracted

K-line's ocean carriers shipped the cargo from China to Long Beach. From there, the cargo was transferred to UPRR, with whom KAM had contracted to transport the cargo from the Port of Long Beach to the various inland destinations. This agreement was memorialized in the Exempt Rail Transportation Agreement ("ERTA"), which explicitly stated that "[l]iability for freight loss and damage to lading while under the control of [UPRR] shall be governed by MITA [the Master Intermodal Transportation Agreement]." The MITA provided that the MITA plus any bills of lading constituted the entire contract between the parties, and included its own forum selection clause that stated that "[a]ll lawsuits for freight loss or damage must be filed in a court of competent jurisdiction in Omaha, Douglas County, Nebraska." The MITA also (1) prohibited the interpretation of its terms under foreign law; (2) explicitly provided that "[t]his MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709"; and (3) expressly established that "Carmack liability coverage is *not* available for any Shipments that originate outside the borders of the United States of America."

Unfortunately, the UPRR train carrying the aforementioned cargo derailed in Tyrone, Oklahoma. Based on the alleged damage to the cargo, Plaintiffs filed suits against Defendants in Los Angeles County Superior Court. UPRR removed the cases to the Federal District Court for the Central District of California. Once the cases were removed, Defendants moved to dismiss the actions, relying on the Tokyo

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with the Carrier, is often referred to as a "Himalaya clause." *See Kirby*, 543 U.S. at 20 & n. 2, 125 S.Ct. 385.

forum selection clause in the bills of lading. The district court granted their motion. *See Regal-Beloit Corp. v. Kawasaki Kisen Kaisha, Ltd.*, 462 F.Supp.2d 1098, 1105 (C.D.Cal.2006).

The district court concluded that the Tokyo forum selection clause was reasonable, and that KAM and UPRR could enjoy its benefits under the Himalaya Clause. *See id.* at 1102-03. It went on to determine that Carmack's venue restrictions applied neither to the overseas leg of the cargo shipment, which were instead governed by COGSA, nor to the inland leg of the cargo shipment. *See id.* at 1103-04. With respect to the inland leg, the district court explained that although this transport would typically be subject to Carmack's restrictions, here the parties entered into the bills of lading under 49 U.S.C. § 10709, thereby enabling the parties to contract out of the Carmack Amendment's terms. *See id.*

We disagree. Under our case law, Carmack—not COGSA—must govern Defendants' liability for the inland rail transport here. Therefore, Tokyo is an acceptable forum under the provisions of Carmack only if the parties satisfied the applicable requirements under either § 10709 or § 10502 for contracting out of Carmack's default venue restrictions. As we explain below, a careful reading of Carmack reveals that § 10709 does not govern the kind of carriage at issue in this case and the district court therefore erred by applying that section instead of § 10502. Accordingly, we reverse and remand so the district court can determine in the first instance whether the parties complied with § 10502.

STANDARD OF REVIEW

We reject Defendants' argument that we must apply the abuse of discretion standard of review, which

applies only to a district court's factual finding regarding a forum selection clause's reasonableness. *See Kukje Hwajae Ins. Co. v. The "M/V HYUNDAI LIBERTY,"* 408 F.3d 1250, 1254 (9th Cir.2005). Here, the parties concede that the forum selection clause is reasonable. Instead, the dispute turns on which statutory law applies and whether this body of law voids the forum selection clause regardless of its reasonableness. We review these issues of statutory interpretation de novo. *See Chateau des Charmes Wines Ltd. v. Sabate USA Inc.*, 328 F.3d 528, 530 (9th Cir.2003); *Richards v. Lloyd's of London*, 135 F.3d 1289, 1292 (9th Cir.1998) (en banc).

DISCUSSION

I. Statutory Provisions

Because of their centrality to our analysis, we summarize the relevant provisions of Carmack and COGSA before turning to the question of which statute applies here.

Congress added the Carmack Amendment to the Interstate Commerce Act in 1906. Carmack, which governs rail and motor carriers that are under the jurisdiction of the Surface Transportation Board ("the Board," previously referred to as the Interstate Commerce Committee, or "the ICC"), narrowly limits the venues in which a claim against carriers under the Board's jurisdiction may be brought. Carmack dictates that:

> [a] civil action under this section may only be brought (i) against the originating rail carrier, in the judicial district in which the point of origin is located; (ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering

> carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and (iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

49 U.S.C. § 11706(d)(2)(A). A "judicial district" is defined as "a judicial district of the United States" or "the applicable geographic area over which [a state] court exercises jurisdiction." 49 U.S.C. § 11706(d)(2)(B). Given these restrictions, forum selection clauses are generally forbidden under Carmack. Notably, however, Congress has since added a series of provisions designed to deregulate aspects of the railroad industry. *See Tokio Marine & Fire Ins. Co. v. Amato Motors, Inc.*, 996 F.2d 874, 877 (7th Cir.1993). Collectively referred to as the Staggers Rail Act, these provisions establish two mechanisms by which rail and motor carriers can contract out of Carmack's restrictions if they satisfy the applicable statutory requirements. *See* 49 U.S.C. §§ 10502(a), 10502(e), 10709(a), 10709(c)(1).

By its terms, COGSA covers transport only between a foreign and American port "from the time when the goods are loaded on to the time when they are discharged from the ship"—commonly referred to as "tackle-to-tackle." 46 U.S.C. § 30701 Notes Sec. 1(e). COGSA does, however, explicitly authorize sea carriers and shippers to extend its rules contractually to cover inland transportation or transportation between two American ports. *See* 46 U.S.C. § 30701 Notes Sec. 7, 13. Unlike Carmack, COGSA does not include any venue restrictions that would prohibit the enforcement of a forum selection clause.

II. The Carmack Amendment vs. COGSA

It is undisputed that the responsibility clauses in the bills of lading purport to extend the application of COGSA to the entire period of transport, and that the Himalaya Clause extends the full benefits of the bills of lading to all of the carrier's subcontractors "as if such provisions were expressly for their benefit." Nevertheless, Plaintiffs argue that Carmack's venue restrictions should still govern because Carmack's statutory force "trumps" the parties' attempt to contractually extend COGSA.[6] Defendants respond that Carmack cannot apply to the inland rail carriage because the entire shipment was governed by through bills of lading, whereas a *separate* domestic bill of lading is necessary for Carmack to apply to inland transport. In the alternative, Defendants assert that even if the Carmack Amendment could apply in the absence of a separate bill of lading for the domestic carriage, in this case COGSA should govern in light of

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[6] We reject Plaintiffs' claim that Carmack should automatically apply under the law of the case doctrine because the district court originally denied UPRR's motion to transfer venue by applying Carmack. The district court clarified in a later order that Carmack's venue limiting provision did *not* apply. Even if it had not, the district court's earlier decision would not bind our reasoning under the law of the case doctrine, which generally precludes courts "from reconsidering an issue that has already been decided *by the same court, or a higher court* in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir.1997) (emphasis added). We also reject Plaintiffs' assertion that UPRR conceded Carmack's applicability in its motion to remove the proceedings to federal court. The motion's statement that "[t]he first cause of action in the [complaint] ... contains the elements required to plead a claim against UPRR under the Carmack Amendment," was not a concession that Carmack applies, but instead simply an argument that federal question jurisdiction was appropriate.

the parties' express agreement to extend COGSA's provisions to all subcontractors, as reflected in the bills of lading. Defendants fairly argue that policies recently endorsed by the Supreme Court—such as uniformity in the law of maritime contracts and contractual autonomy for sophisticated shippers and carriers—recommend applying COGSA here. *See Kirby*, 543 U.S. at 29, 125 S.Ct. 385. These policies notwithstanding, according to the statutory language and our holding in *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118 (9th Cir.2000), Carmack supplies the default regime governing the inland rail shipment here. We therefore hold that COGSA applies only if the parties properly opted out of Carmack.

A.

Before we turn to Defendants' joint arguments, we reject the K-line defendants' threshold assertion that Carmack cannot apply to ocean carriers and their agents. To support their argument, however, K-line and KAM quote selectively from Carmack. By its terms, Carmack applies to "[a] rail carrier providing transportation or service subject to the jurisdiction of the Board under this part," 49 U.S.C. § 11706(a), where a "rail carrier" is "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Critically, the statute goes on to define "railroad" as including "a bridge, car float, lighter, ferry, *and intermodal equipment used by or in connection with a railroad.*" 49 U.S.C. 10102(6)(A) (emphasis added). Moreover, the Board's jurisdiction, which is coextensive with Carmack's coverage, includes "transportation that is by railroad and water, *when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.*" 49 U.S.C. § 10501(a)(1)(B) (emphasis

added). Here, K-line shipped the cargo from China to the Port of Long Beach on K-line's ocean liner, issued bills of lading that covered the cargo from its place of origin to the final destinations in the United States and contracted with UPRR to ship the cargo from the Port of Long Beach to the Midwest through its agent KAM, who acted on K-line's behalf in receiving its vessel and providing for the inland transport. The K-line defendants therefore provided "continuous carriage or shipment" that was "by railroad and water" via "intermodal equipment used by or in connection with a railroad." As a result, Carmack applies to K-line and its agent.

Applying Carmack to K-line is also consistent with the purpose of Carmack's liability regime, which is "to relieve shippers of the burden of searching out a particular negligent carrier from among the often numerous carriers handling ... goods." *Reider v. Thompson*, 339 U.S. 113, 119, 70 S.Ct. 499, 94 L.Ed. 698 (1950). Because Plaintiffs dealt directly with K-line to arrange a shipment that included domestic rail carriage, we uphold Carmack's objectives by applying the statute to K-line and its agent.

Few opinions have squarely addressed the potential application of Carmack to ocean carriers and their agents and no Supreme Court or Ninth Circuit precedent appears to address this issue. Nevertheless, most of the limited federal jurisprudence on this question either states that Carmack applies to an ocean carrier and its agent or implicitly suggests that it could. *See United States v. Miss. Valley Barge Line Co.*, 285 F.2d 381, 391-94 (8th Cir.1960) (Blackmun, J.) (holding that Carmack applied to a water carrier that was the contracting carrier when there was a common arrangement as indicated by a through bill of lading); *Kyodo U.S.A., Inc. v. Cosco N. Am. Inc.*, No. 01-CV-

499, 2001 WL 1835158, at *3-5 (C.D.Cal. July 23, 2001) (holding that Carmack could apply to an ocean carrier); *Canon USA, Inc. v. Nippon Liner System, Ltd.*, No. 90 C 7350, 1992 WL 82509, at *5-8 (N.D.Ill. Apr.17, 1992) (applying Carmack to an ocean carrier); *Nelson v. Agwilines, Inc.*, 70 F.Supp. 497, 500 (S.D.N.Y.1946) (noting that although "[o]rdinarily a carrier that is wholly a carrier by water is not subject to regulation by [the Board,] [m]any carriers by water have through bill of lading arrangements with railroads, which make the carriers by water subject to regulation by [the Board]"). Until recently, only two authorities, neither of which we find persuasive, explicitly held that Carmack does not apply to an ocean carrier: a decision from the Florida Supreme Court and a subsequent decision from the Federal District Court for the Southern District of Florida that relied on the previous state court decision. *See King Ocean Cent. Am., S.A. v. Precision Cutting Servs., Inc.*, 717 So.2d 507, 513 (Fla.1998) (holding that "an ocean carrier's liability was not contemplated or covered under the Carmack Amendment"); *PT Indonesia Epson Indus. v. Orient Overseas Container Line, Inc.*, 219 F.Supp.2d 1265, 1269 (S.D.Fla.2002) (following *King Ocean*'s analysis and determining that "the Carmack Amendment does not necessarily apply to the through bill of lading issued by [the ocean carrier]"); *contra, Kyodo*, 2001 WL 1835158 at *4 (unpublished district court opinion in this circuit explicitly refusing to endorse *King Ocean*'s analysis).

Since this case was argued, however, the Second Circuit has construed Carmack's definition of a "rail carrier" not to reach two categories of common carriers: (1) an entity "that merely arranges" for goods to be transported by sea and then transferred to a railroad for inland transport, but never itself actually

moves the goods; and (2) a common carrier, such as an ocean carrier, that does not conduct rail services or "'hold out' that service to the public." *Rexroth Hydraudyne B.V. v. Ocean World Lines, Inc.*, 547 F.3d 351, 362, 364 (2d Cir.2008). K-line and KAM urge us to follow *Rexroth* and exempt them as well. We do not read *Rexroth* so broadly, and in any event decline to apply its limitation of Carmack to the intermodal transport arrangement here.

In *Rexroth*, the plaintiff shippers contracted with a non-vessel-operating common carrier ("NVOCC") that acted as a middleman, arranging for ocean and inland rail carriage "from receipt to delivery." *Id.* at 356. As the term implies, the NVOCC provided no services on any vessel it owned nor did it otherwise physically handle the shipment itself. *See id.* at 361-62. Instead the NVOCC subcontracted with "an ocean carrier that provide[d] the ocean passage," who in turn subcontracted through its American agent to "arrange[ ] rail carriage for the inland leg." *Id.* at 356. Nearly all the Second Circuit's reasoning addressed this middleman, emphasizing that an entity without "any contact with the shipped goods or any performance in the carrying of those goods" merely arranges for railroad transportation and therefore does not *provide* transportation as required for Carmack liability. *Id.* at 361-62. Even if we were to accept this reasoning, it would not apply to K-line's arrangement because there was no middleman between K-line and Plaintiffs. Rather, Plaintiffs dealt directly with K-line, who actually transported the cargo on its ocean liner and had sustained contact with the shipped goods.

Rexroth also summarily excluded the ocean carrier defendant whose services were most analogous to those K-line provided here, saying that the ocean carrier did "not own or operate rail lines or other

equipment *used in connection with a railroad.*" *Id.* at 363 (emphasis added). The Second Circuit did not address the statutory definition of railroad transportation we have discussed above, but instead simply concluded without factual explanation that the ocean carrier neither conducted nor held itself out as conducting railroad transportation. *See id.* at 364. Thus we do not know the nature or substance of the ocean carrier's direct interactions, if any, with the shipper. We do know that here, K-line held itself out to the public and contracted with Plaintiffs to transport their goods all the way from China to their inland destinations—by sea utilizing K-line's vessel and by rail utilizing UPRR. In so doing, K-line and its agent, KAM, engaged in railroad transportation subject to the Board's jurisdiction by providing Plaintiffs with continuous carriage by water and rail, utilizing intermodal equipment in connection with a railroad. *See* 49 U.S.C. §§ 10102(6)(A), 10501(a)(1)(B).

In sum, we do not read *Rexroth* to categorically exclude ocean carriers from Carmack liability. The plain language of the statute and a careful application of the Second Circuit's reasoning support our conclusion that K-line and KAM provided railroad transportation covered by Carmack.[7] We therefore

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[7] The Second Circuit also seemed to suggest that because ocean carriers fall under the jurisdiction of the Federal Maritime Commission ("FMC"), they cannot also be regulated by the Board. *See Rexroth*, 547 F.3d at 357. The FMC has jurisdiction to "regulate ocean shipping lines operating between the United States and foreign countries," "monitor [ ] agreements between ocean common carriers" and "enforc[e] a number of prohibitions against discriminatory and unreasonable rates and practices." *Transpacific Westbound Rate Agreement v. Fed. Maritime Comm'n*, 951 F.2d 950, 951 (9th Cir.1991). Nothing in the FMC's

hold that Carmack applies to ocean carriers and their agents under the circumstances here.

B.

Defendants jointly argue that Carmack cannot apply to a shipment from a foreign country into the United States under a through bill of lading, and therefore the parties' contractual extension of COGSA, with its more liberal rules regarding venue, should control here. In support of their argument, Defendants highlight that four circuits have held that "the Carmack Amendment does not apply to a shipment from a foreign country to the United States (including an ocean leg and overland leg to the final destination in the United States) *unless the domestic, overland leg is covered by a separate bill of lading.*" *Altadis USA, Inc. ex. rel. Fireman's Fund Ins. Co. v. Star Line, LLC*, 458 F.3d 1288, 1291 (11th Cir.2006) (emphasis added); *see Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565, 569 (6th Cir.2003); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 703 (4th Cir.1993); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391, 394 (7th Cir.1992); *but see Sompo I*, 456 F.3d at 57, 60-69 (holding that Carmack applies to the domestic rail portion of a continuous intermodal shipment originating in a foreign country even where the transport was under a single through bill of lading that incorporated COGSA beyond the tackle-to-tackle phase). Despite this weight of authority, our own precedent expressly forecloses Defendants' argument in this circuit. In *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir.2000), we held that "the language of [Carmack] also encompasses the inland leg of an overseas

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jurisdictional statute makes its jurisdiction exclusive. *See* 46 U.S.C. § 40301.

shipment conducted under a single 'through' bill of lading ...." *See Nippon Yusen Kaisha v. Burlington & N. Santa Fe Ry. Co.*, 367 F.Supp.2d 1292, 1298 n.4 (C.D.Cal.2005); *Chubb Group of Ins. Cos. v. H.A. Transp. Sys., Inc.*, 243 F.Supp.2d 1064, 1068 n. 3 (C.D.Cal.2002).[8]

Contrary holdings in the Fourth, Sixth, Seventh and Eleventh Circuits rest on the notion that the Board lacks jurisdiction over intermodal shipments into the United States from a point in a foreign country under a through bill of lading. *See, e.g., Am. Road Serv. Co.*, 348 F.3d at 568 ("The [Board]'s jurisdiction does not extend to a shipment under a through bill of lading unless a domestic segment of the shipment is covered by a separate domestic bill of lading."). The Second Circuit has disagreed, holding that a plain reading of the Board's jurisdictional statute applies Carmack to any rail transportation in the United States, even if it originated in a foreign country under a through bill of lading. *See Sompo I*, 456 F.3d at 64. As we noted above, Carmack's reach is coextensive with the Board's jurisdiction, *see* 49 U.S.C. § 11706(a); therefore our conclusions regarding the extent of the Board's jurisdiction, expressed in *Neptune*, determine Carmack's reach as well. Crucially, *Neptune* interpreted our precedent and Carmack's language to apply to "shipments to or from overseas ports" without any requirement for a separate domestic bill of lading for the inland carriage. *Neptune*, 213 F.3d at 1119

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[8] Although some district courts within the Ninth Circuit have held that the Carmack Amendment did not apply when the cargo at issue was shipped pursuant to a single through bill of lading, these opinions predate *Neptune*. *See, e.g., Tokio Marine & Fire Ins. Co., Ltd. v. Kaisha*, 25 F.Supp.2d 1071, 1081 (C.D.Cal.1997).

(citing *F.J. McCarty Co. v. S. Pac. Co.*, 428 F.2d 690, 692 (9th Cir.1970)).

Defendants' attempt to relegate *Neptune*'s interpretation of Carmack to the status of dictum is unavailing. There is no indication that *Neptune*" did not make a deliberate decision to adopt the rule of law it announced." *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir.2001). Consequently, the absence of a separate bill of lading does not remove this shipment from Carmack's venue restrictions.

C.

Defendants next argue that even if the Carmack Amendment *could* apply to the inland leg of an international transport conducted under a single through bill of lading, here the parties' explicit contractual extension of COGSA inland should take precedence. Given COGSA's statutory language, *Neptune*'s holding is fatal to this argument. *Neptune*'s import becomes clear when analyzed in light of the distinctions and interactions between three sections of COGSA, currently codified at 46 U.S.C. § 30701 Notes Sec. 7, 12 & 13.[9] In relevant part, the text of these sections is as follows:

- **Section 7:** Nothing contained in this chapter [this note] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods

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[9] Previously 46 U.S.C. app. §§ 1307, 1311 and 1312, respectively.

are carried by sea. 46 U.S.C. § 30701 Notes Sec. 7.

- **Section 12:** Nothing in this chapter [this note] shall be construed as superseding any part of [the Harter Act], *or of any other law which would be applicable in the absence of this chapter* [this note], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship. 46 U.S.C. § 30701 Notes Sec. 12 (emphasis added).
- **Section 13:** This chapter [this note] shall apply to all contract for carriage of goods by sea to or from ports of the United States in foreign trade .... The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter [this note] shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possession: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter [this note], shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter [this note]. 46 U.S.C. § 30701 Notes Sec. 13.

Reading these three sections together reveals two interrelated reasons why the contractual extension of

COGSA to the inland leg of an intermodal, international transport cannot supersede the requirements imposed by Carmack.

First, although Section 7 "confirms that nothing *in COGSA* constrains the parties" from contractually extending COGSA's protections beyond the tackle-to-tackle period, it "leav[es] open the possibility that *something else* might constrain them." Michael F. Sturley, *Freedom of Contract and the Ironic Story of Section 7 of the Carriage of Goods by Sea Act*, 4 BENEDICT'S MARITIME BULL. 201, 203 (Third/Fourth Quarter 2006) (emphasis added) [hereinafter *Freedom of Contract*]. Section 12 "completes the story that Section 7 merely begins," by explicitly confirming that this contractual autonomy is constrained by the presence of any other law that would govern the parties before loading or after discharge. *Id.* at 203. In light of *Neptune*, the Carmack Amendment is just such an "other law" to which Section 12 mandates that the contractual inland extension of COGSA must yield. *See Sompo I*, 456 F.3d at 72-73 (relying in part on Section 12 to "hold that the contractual provision extending COGSA's terms inland must yield to Carmack").[10]

Second, Section 13's language has an important negative implication for our interpretation of the legal force of a contractual extension of COGSA under Section 7. *See id.* at 70. Through Section 13, "Congress

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[10] The congressional debates about COGSA reflect a similar understanding. As Senator White explained, "[t]he legislation supersedes the so called 'Harter Act' from the time the goods are loaded on the ship to the time they are discharged from the ship. *Otherwise our law remains precisely as it is, unaffected and unimpaired by the proposed legislation.*" 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 589 (Michael F. Sturley ed.1990) (emphasis added).

explicitly provided that contracts extending [COGSA's] reach in ways other than over land—in particular, contractual extensions covering trade between United States ports (or 'coastwide trade')—do have statutory force" and can "supersede prevailing federal statutes." *Id.* at 69-70.[11] Congress did not include any comparable language with respect to a contractual extension of COGSA to inland transport under Section 7, simply stating that nothing within COGSA prevents parties from doing so. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Camacho v. Bridgeport Fin. Inc.*, 430 F.3d 1078, 1081 (9th Cir.2005) (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)). "Therefore, that Congress, in enacting [Section 7], omitted language similar to the language in [Section 13] is persuasive evidence that Congress did not wish for period of responsibility clauses [adopted under Section 7] to have the force of statute with the capability to supersede federal law." *Sompo I*, 456 F.3d at 71; *see Freedom of Contract* at 204 (noting this textual distinction "is compelling evidence that indirectly confirms what Section 12 says directly—that Section 7 was not intended to permit a private contract to override otherwise applicable law").[12]

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[11] In the absence of such an extension, another federal statute, the Harter Act, applies to shipments between domestic ports. *See Sompo I*, 456 F.3d at 69 n. 15.

[12] The Second Circuit recently reaffirmed this core holding of *Sompo I*. *See Rexroth*, 547 F.3d at 355 ("It is clear from *Sompo* that a 'contractual provision extending COGSA's terms inland

Read together, these provisions make clear that "contracts extending COGSA beyond the tackles must give way to conflicting law." *Sompo I*, 456 F.3d at 71.[13]

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must yield to Carmack' if Carmack is applicable.") (quoting *Sompo I*, 456 F.3d at 73).

[13] We briefly distinguish earlier decisions containing general statements that the contractual extension of COGSA could supersede other statutes. *See Starrag v. Maersk, Inc.*, 486 F.3d 607, 615 (9th Cir.2007); *Sea-Land Serv., Inc. v. Lozen Int'l, L.L.C.*, 285 F.3d 808, 817 (9th Cir.2002); *N. River Ins. Co. v. Fed Sea/Fed Pac Line*, 647 F.2d 985, 987 (9th Cir.1981). First, none of these cases addressed a potential conflict between COGSA and Carmack. Second, the original source for all of these statements is *Pan Am. World Airways, Inc. v. Cal. Stevedore & Ballast Co.*, 559 F.2d 1173 (9th Cir.1977). *See N. River*, 647 F.2d at 987 (citing *Pan Am.*); *Sea-Land*, 285 F.3d at 817 (citing *N. River*); *Starrag*, 486 F.3d at 615 (citing *Sea-Land*). Importantly, *Pan American* addressed "a contract for carriage between a port in the continental United States and a port in a United States possession." 559 F.2d at 1175 n. 3. In other words, *Pan American* dealt with an extension of COGSA to coastwide trade, and therefore triggered Section 13's explicit mandate that such extensions should apply "as fully as if subject [thereto] by the express provisions of [COGSA]." *Id.* (quoting 46 U.S.C. § 1312). Its holding therefore has no bearing on the legal weight that should be afforded to inland contractual extensions of COGSA under Section 7. *See N. River*, 647 F.2d at 988-89 (noting this distinction). Finally, none of these opinions ultimately relied on its statements that the contractual extension of COGSA could supersede a federal statute in order to reach its holding. *See Starrag*, 486 F.3d at 615 (noting that "where the parties contractually extend the COGSA to cover the damage, the Harter Act does not apply," but ultimately concluding that "even if the Harter Act applied," it would not prohibit the challenged limited liability clause); *Sea-Land*, 285 F.3d at 817 (noting that "because COGSA is incorporated by contract into Sea-Land's bills of lading, 'it, rather than the Harter Act, controls,'" but only after it had already concluded that the Harter Act did not apply to the case at bar in the first place); *N. River*, 647 F.2d at 987, 989 (noting that

Per *Neptune*, Carmack is a conflicting law here. Although, as we have discussed, the Eleventh Circuit has allowed the contractual extension of COGSA inland, that court disagrees with ours about the reach of Carmack where the parties have used a through bill of lading. *Compare Neptune*, 213 F.3d at 1119 ("The language of [Carmack] also encompasses the inland leg of an overseas shipment conducted under a single 'through' bill of lading ....") *with Altadis*, 458 F.3d at 1291 ("The case law has established that the Carmack Amendment does not apply to a shipment from a foreign country to the United States ... unless the domestic, overland leg is covered by a separate bill of lading."). Because here Carmack is federal law conflicting with the parties' contractual extension of COGSA, we cannot follow the Eleventh Circuit by validating COGSA's inland reach.

Defendants argue that policy considerations of contractual autonomy, efficiency and uniformity of maritime liability rules weigh in favor of allowing shippers and carriers to extend COGSA inland. The Supreme Court recently endorsed these policy objectives by emphasizing that "[c]onfusion and inefficiency will inevitably result if more than one body of law governs a given contract's meaning." *Kirby*, 543 U.S. at 29, 125 S.Ct. 385. The unanimous Court in *Kirby* further observed that an inability to extend

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"[w]hen COGSA is incorporated by contract, it, rather than the Harter Act, controls" within the context of a case that ultimately turned on the interaction between the contractual extension of COGSA and another *contractual* term). "[W]e are not bound by a holding ... 'where it is merely a prelude to another legal issue that commands the panel's full attention ....' " *V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High Sch. Dist.*, 484 F.3d 1230, 1232 n. 1 (9th Cir.2007) (quoting *United States v. Johnson*, 256 F.3d 895, 915 (9th Cir.2001)).

COGSA's default rules to inland transport, so that entire shipments could be governed by the same liability regime, would defeat "the apparent purpose of COGSA[ ] to facilitate efficient contracting in contracts for carriage by sea." *Id.; see Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 525 F.3d 409, 419 (6th Cir.2008) ("*Kirby*'s reasoning affirms the broader principle that courts should evaluate maritime contracts in their entirety rather than treating each of the multiple stages in multimodal transportation as subject to separate legal regimes, which would be an obstacle to uniform and efficient liability rules."). Ignoring a contractual provision incorporating COGSA seems particularly inappropriate where, as here, "the parties to the bill of lading were sophisticated business entities that should rarely be released from contractual obligations." Raymond T. Waid, Comment, *Piloting in Post-*Kirby *Waters: Navigating the Circuit Split Over Whether the Carmack Amendment Applies to the Land Leg of an Intermodal Carriage of Goods on a Through Bill of Lading*, 34 TRANSP. L.J. 113, 143 (Summer 2007).

Nonetheless, and mindful of these policy considerations, *Kirby* does not control here. There, the Court held that *state* law did not apply to a bill of lading that extended COGSA inland, where COGSA and the state law conflicted. *Kirby*, 543 U.S. at 28-29, 125 S.Ct. 385. Focusing as it did on the need for state law to yield to federal law in the maritime context, the Court did not have occasion to consider which of two conflicting federal laws should govern a maritime shipment with an inland leg. *See Sompo I*, 456 F.3d at 75 ("We cannot interpret the *Kirby* Court's language concerning the policy underlying COGSA ... as implying that a contract extending COGSA inland should supersede an otherwise applicable *federal* law.")

(emphasis in original). The policy of uniformity in maritime shipping law, however compelling, must give way to controlling statutes and precedent. Given *Neptune*'s holding that Carmack applies and the conspicuous absence in COGSA of language allowing parties to give superseding statutory force to their contractual extensions of COGSA inland under Section 7, we hold that a mere contractual extension of COGSA is not sufficient by itself to overcome Carmack.

Nevertheless, Carmack—including its restrictive venue provisions—is merely a set of default rules. To the extent Carmack sanctions alternative provisions, a properly adopted alternative forum selection clause would eliminate Carmack as a conflicting "other law" superseding the parties' contractual extension of COGSA. *Neptune* did not reach this issue and does not hold otherwise. As explained above, COGSA's Section 7 cannot give such contracts statutory force. But Carmack itself does contain two provisions for avoiding the statutory defaults: 49 U.S.C. §§ 10502 & 10709. We next turn to these two possible Carmack opt-outs.

III. Contracting for Alternative Terms under Carmack

As discussed, whereas COGSA would allow a reasonable alternative forum selection clause, Carmack strictly limits the venues in which a party may bring a claim. *See* 49 U.S.C. § 11706(d)(2)(A). In this case, Tokyo does not fit into any of the categories to qualify as an acceptable forum under Carmack. *See Regal-Beloit*, 462 F.Supp.2d at 1103.[14] Accordingly, the Tokyo forum selection clause's enforceability turns on

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[14] We agree with the district court's conclusion that "[i]f applicable, the Carmack Amendment would limit venue in this case to California, Oklahoma, or Wisconsin." *Regal-Beloit*, 462 F.Supp.2d at 1103.

whether the parties complied with the applicable requirements for opting out of Carmack.

Congress created two different mechanisms—§ 10502 and § 10709—by which some rail services may be exempted from certain requirements usually imposed by Carmack. These dual provisions require us to resolve whether the parties entered into a § 10502 or a § 10709 contract and, relatedly, what each provision requires for avoiding Carmack. We conclude that § 10502 is the only proviso the parties here could have followed to contract out of Carmack's venue restrictions. Because the district court instead analyzed the contracts under § 10709, we remand for an application of § 10502, the requirements of which we clarify below.

A.

Once again, we preface our analysis by looking to the relevant statutory language. Section 10502(f) authorizes the Board to exempt from Carmack "transportation that is provided by a rail carrier as part of a continuous intermodal movement." Here, "rail carrier" is subject to the same "Definitions" section we applied above to conclude that even an ocean carrier like K-line is a rail carrier when contracting to provide inland rail transportation. *See* 49 U.S.C. § 10102 (providing definitions for "this part").[15] Thus, K-line is a rail carrier for purposes of determining whether it provides transportation that is exempt under the Board's § 10502 authority. It is undisputed that the Board has exempted the transportation at issue here. *See* 49 C.F.R. § 1090.2 ("[R]ail TOFC/COFC service and highway

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[15] Specifically, " '[t]his part' refers to 49 U.S.C. Subtitle IV, Part A, which includes Carmack." *Sompo II*, 540 F.Supp.2d at 494.

TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV....").[16]

The Board's action relieves carriers providing such *exempt* transportation from certain regulatory burdens, such as rate regulation. *See, e.g.*, 49 U.S.C. § 10701. Carmack's liability and venue rules are not so plainly waived, however. The statute mandates that "[n]o exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title." 49 U.S.C. § 10502(e). Nonetheless, § 10502(e) also provides that carriers and shippers thus exempted are not unalterably bound by the liability and venue restrictions in Carmack's § 11706, because "[n]othing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms ...." *Id.* These two clauses of § 10502(e) are not inconsistent: carriers providing exempt transportation are obliged to provide terms consistent with Carmack's venue and liability protections to their shipper customers, but are ultimately free to contract for terms different from those in § 11706. Courts have concluded that the "combined effect" of § 10502 and § 11706 is to permit carriers providing exempt transportation to contract for terms that are different from Carmack's defaults so long as they first offer the shipper the option of full Carmack protections, presumably at a higher rate. *See Sompo I*, 456 F.3d at 60 (collecting authority). If the

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[16] These acronyms respectively refer to "trailer on flatcar" and "container on flatcar" service.

carrier fails to make this initial offer, however, "then the shipper may sue the carrier under Carmack." *Id.*[17]

On the other hand, avoiding Carmack's default rules under § 10709 is simpler: "[o]ne or more rail carriers providing transportation *subject to the jurisdiction of the Board* ... may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions." 49 U.S.C. § 10709(a) (emphasis added). Under such an agreement for *nonexempt* transportation, carriers "have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract." 49 U.S.C. § 10709(b). Moreover, "[a] contract that is authorized by this section, and transportation under such contract, shall not be subject to *this part*, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part,"49 U.S.C. § 10709(c)(1) (emphasis added)—"this part" encompassing the Carmack Amendment.

The terms of these two different provisions evidence a clear distinction between § 10502 contracts and § 10709 contracts. The distinction is based on whether the transportation at issue in the contract is exempt from Board regulation. Whereas § 10502 requires carriers providing *exempt* transportation to offer Carmack protections before they can successfully contract for alternative terms, § 10709 contains no such language—indeed, it explicitly contemplates that *nonexempt* carriers' contracts alone control. Defendants argued successfully before the district court that they entered into a § 10709 contract with

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[17] The Second Circuit's recent limitation of *Sompo I* in *Rexroth*, 547 F.3d at 360 n. 15, discussed *Sompo I*'s interpretation of § 10502 with approval.

Plaintiffs, and thus were not required to offer Carmack protections as a prerequisite for their extension of COGSA to the inland segment of the transport. Defendants point to the MITA, which was incorporated by the ERTA and explicitly states "[t]his MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709." Plaintiffs argue on appeal that Defendants could not have entered into even a legitimate § 10709 contract without first offering full Carmack protections.[18] We disagree with both parties' reasoning. Plaintiffs are incorrect that § 10709 requires offering Carmack protections. *See Sompo II*, 540 F.Supp.2d at 494 (collecting district court cases); *but see id.* at 495-98 (discussing cases that "have varied wildly" on this issue). In any event, Defendants are mistaken that simply asserting in a contract that it was made under § 10709 makes it so. The contract here had to be a § 10502 contract because it concerned *exempt*

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[18] Although Plaintiffs did not explicitly raise this argument in their opposition to the motion to dismiss, we exercise our discretion to address it here. *See Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 59 F.3d 902, 912 (9th Cir.1995). Plaintiffs had no reason to address the potential inapplicability of § 10709 below because this was not raised by Defendants in their motions to dismiss, which instead were limited to the assertion that COGSA, rather than Carmack, should govern. Defendants only added that they were exempt from the Carmack's requirements under § 10709 in their reply briefs. It is unreasonable to require Plaintiffs to argue that a particular provision did not apply before Defendants even suggested that this provision authorized their contracts. Reaching the argument is appropriate because this issue presents a purely legal question, *see id.*, and Defendants will not be prejudiced, as they have fully briefed this issue on the merits, *see United States v. Fonseca-Caro*, 114 F.3d 906, 907 n. 2 (9th Cir.1997) (per curiam).

transportation, and must therefore be analyzed on remand under the requirements of that section.

B.

The parties' confusion is understandable given the "muddled state of the law." *Sompo II*, 540 F.Supp.2d at 498 & n. 8 (citing "[s]everal courts [that] have noted that this issue has not been adequately addressed"). Congress has not provided any guidance regarding how to read § 10502 and § 10709 in tandem, and very few courts have squarely confronted the question.[19]

We cannot adopt either of the parties' arguments, however, as each would render one of the statutory provisions practically meaningless. Plaintiffs' argument that a carrier can form a § 10709 contract only if it first offers the shipper full Carmack protections essentially converts all § 10709 contracts into § 10502 contracts. *Cf. Sompo II*, 540 F.Supp.2d at 494 ("Most courts have concluded that [the statutory] language indicates that § 10709 contracts are not subject to Carmack, and need not offer a full Carmack liability option before properly limiting carrier liability."). Defendants' argument, however, effectively nullifies § 10502 because it would allow any carrier—even those exempted under § 10502—to avoid § 10502's prerequisites simply by stating that its contract was pursuant to § 10709.[20] It would be "nonsensical for ...

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[19] The parties have therefore been forced to rely on unpublished district court decisions to support their respective arguments. *See Tamini Trasformatori S.R.L. v. Union Pac. R.R.*, No. 02 Civ. 129, 2003 WL 135722 (S.D.N.Y. Jan. 17, 2003) (supporting Plaintiffs' argument); *Tokio Marine & Fire Ins. Co. v. Mitsui O.S.K. Lines, Ltd.*, No. CV 02-3617, 2003 WL 23181013 (C.D. Cal. June 27, 2003) (supporting Defendants' argument).

[20] We are particularly troubled by the potential for such an outcome where, as here, the statement that the agreement is

§ 10502 to permit a certain category of rail contracts to offer specific rates and terms but require an initial offer of full Carmack liability and ... § 10709 to permit the *same category of rail contracts* to offer specific rates and terms with no such requirement of an initial offer of full Carmack liability." *Id.* at 499 (emphasis in original); *see also id.* ("Section 10709 simply cannot be used as a tool to extract contracts governing exempted rail carriers that operate one leg of a continuous intermodal movement from the regulatory demands of § 10502 and Carmack."). When the Board exempted the category of transportation at issue here, the providers of that transportation, including Defendants, gained the benefits of deregulated rates. The Board's exemption removed this transportation "from the requirements of 49 U.S.C. subtitle IV," 49 C.F.R. § 1090.2, which includes the provision setting standards for rates, *see* 49 U.S.C. § 10701. But Subtitle IV also includes § 10709. Consequently, carriers providing exempt transportation gain the benefits of deregulation, but lose the opportunity to contract for preferable terms under § 10709 without first offering Carmack terms.

In keeping with Congress' specification of two distinct methods for carriers to avoid the requirements imposed by Carmack, we therefore hold that a carrier providing nonexempt transportation may contract under § 10709 without offering Carmack protections, but a carrier providing exempt transportation must

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governed by § 10709 is buried within several layers of incorporated text, of which the shipper had no direct knowledge. *See Sompo II*, 540 F.Supp.2d at 500 ("First, it is not clear that the shippers ... are on actual notice of either the ITAs or the rail carrier circulars or have the opportunity to review them and, second, there are too many steps incorporated by reference to properly charge the shippers with notice of their terms.").

proceed under § 10502, which does require such an offer. *See Sompo II*, 540 F.Supp.2d at 499. Accordingly, Defendants here could not have entered into a § 10709 contract notwithstanding the MITA's clause declaring otherwise. Defendants accept that § 10502 covers exempt transportation, but argue that carriers providing exempt transportation could nevertheless still *choose* to contract under § 10709. Our interpretation of the relationship between § 10502 and § 10709 forecloses this argument. [21]

C.

In sum, § 10502 provides the only acceptable method through which these parties *might* have agreed to the Tokyo forum selection clause. To comply with § 10502, K-line needed to offer Carmack's protections when contracting with Plaintiffs. K-line argues that it did so, pointing to a clause in the MITA that reads, "[o]n domestic shipments that originate in the United States, Shippers may, at their option, select the liability provisions set forth in 49 U.S.C. § 11706." We

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[21] During oral argument, Defendants attempted to elude § 10502's requirements, asserting that: (1) § 10502 applies only to "common carrier" contracts, (2) § 10709 applies only to "private" contracts and (3) the instant contract falls into the latter category. We reject this argument. First, the argument was waived. *See United States v. Kimble*, 107 F.3d 712, 715 n. 2 (9th Cir.1997) (noting that arguments which are "not coherently developed in [the] briefs" are abandoned); *Acosta-Huerta v. Estelle*, 7 F.3d 139, 144 (9th Cir.1992) (noting that "issues raised in a brief which are not supported by argument are deemed abandoned"). Second, this argument appears to have no basis in our case law or statutes. We found no authority that distinguishes between § 10709 and § 10502 contracts in the manner Defendants suggest. Furthermore, neither § 10709 nor § 10502 uses the terms "private contract" or "common carrier contract" and neither of these phrases is included in the statute's "definitions." *See* 49 U.S.C. § 10102.

are skeptical that reference to Carmack in connection with shipments originating *in the United States*, appearing in the MITA instead of in the bills of lading, could fulfill § 10502's requirement that Carmack protections be offered. Perhaps more compellingly, K-line points to Clause 5(1) of the bills of lading, which allows K-line to subcontract with rail carriers "on any terms whatsoever." From this, it might be inferred that by making the choice to allow K-line to do all the subcontracting on "any terms whatsoever," Plaintiffs implicitly considered and rejected Carmack terms. Plaintiffs counter that no evidence of an offer of these terms exists and that another part of the MITA seems to preclude Carmack from applying.[22]

It is improper for us, on this record, to decide in the first instance whether the parties' negotiation and

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[22] The parties' disagreement about what was offered in the bills of lading by way of the later provisions of the MITA is unsurprising because the interactions among the bills of lading, the MITA and ERTA are far from clear. Although the MITA states that "all Shipments are subject to this MITA" regardless of their billing method (including a bill of lading), it also establishes that "this MITA ... as well as the terms and condition of ... ocean or rail carrier's Bills of Lading ... shall constitute the entire contract for transportation between the parties." The terms of the MITA do not make clear, then, whether the MITA's or the bills of lading's terms take precedence in the case of a conflict. This becomes increasingly complex because the ERTA never explicitly incorporated the MITA's *venue* provisions, and it is unclear whether its more general incorporation language would encompass these restrictions. Finally, the MITA establishes that changes *can* be made to its terms *if* they are "approved in writing prior to the issuance of any shipping document," or "through a document signed by a duly authorized manager of UPRR." The record does not indicate whether any such authorization occurred. This factual morass may benefit from further development before the district court on remand.

acceptance of their numerous, cross-referenced agreements included an offer of Carmack terms or an understanding that Carmack terms were available but were rejected. Section 10502(a) says only that the Carmack terms must be offered, not necessarily that they appear in the written agreement. Thus, on remand, the district court may develop the record with respect to the parties' understanding of whether Carmack terms were on the table when they executed the bills of lading.

CONCLUSION

As a matter of policy, it may be that sophisticated commercial entities should be able to freely decide by contract the liability regime that is to govern the shipment of goods from a foreign country to their ultimate destination in the United States, and do so utilizing a single bill of lading. Nonetheless, given the language of the relevant federal statutes and our own precedent, we hold that COGSA does not govern the inland transport at issue here unless the parties opted out of Carmack in accordance with the requirements of 49 U.S.C. § 10502. We further hold that § 10709 cannot apply here given the exempt status of the transportation involved. Because the district court did not consider whether the parties opted out of Carmack's default rules under § 10502, thereby clearing the way for COGSA to apply by contractual extension, we remand for that determination.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
C.D. CALIFORNIA.

REGAL-BELOIT CORPORATION, Plaintiff,
v.

KAWASAKI KISEN KAISHA, LTD., et al.
DEFENDANT.

No. CV06-3016DSF

Nov. 13, 2006

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462 F. Supp. 2d 1098

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS PURSUANT TO THE TOKYO DISTRICT COURT FORUM SELECTION CLAUSE IN THE BILL OF LADING

FISCHER, District Judge.

I. INTRODUCTION

By this motion Defendants seek to dismiss this action pursuant to the Tokyo District Court forum selection clause in the K-Line Bills of Lading.

II. FACTS

During March and April of 2005, Defendants Kawasaki Kisen Kaisha, Ltd. ("Kawasaki") and "K" Line America, Inc. ("K-Line") accepted cargo

shipments from Plaintiffs,[1] to be carried from Shanghai, China to various delivery points within the United States via the Port of Long Beach.[2] (*See* Declaration of Jian Jia Ying ("Ying Decl.") ¶¶ 4, 8; Declaration of Thomas Kwok ("Kwok Decl.") ¶ 5; Declaration of Hua Gui Xing ("Xing Decl.") ¶ 4, 5.) The shipments were undertaken pursuant to contractual agreements between Defendants and each of the Plaintiffs, which were memorialized in Bills of Lading.

The Bills of Lading include the following relevant provisions:

> Clause 1 (Definitions & Tariff)
>
> (1)(b) "Carrier" means KAWASAKI KISEN KAISHA, LTD., Vessel, her owners, operators and charterers whether acting as carrier or bailee ...

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[1] Plaintiffs in this case are Regal-Beloit Corporation (Case No. 06-3016), a Wisconsin Corporation with its principal place of business at 200 State Street, Beloit, Wisconsin 53511 (Regal Compl. ¶ 1); Victory Fireworks, Inc. (Case No. 06-3017), a Wisconsin Corporation with its principal place of business at 579 Vincent Lane, Ellsworth, Wisconsin 54011 (Victory Compl. ¶ 1); PICC Property and Casualty Company, Ltd. (Case No. 06-3018), a foreign insurance company with its principal place of business at 2 Floor, 700 Zhongshan Road (S), Shanghai 2000010, China (PICC Compl. ¶ 1); and Royal & Sun Alliance Insurance Co., Ltd. (Case No. 06-3019), a foreign insurance company based in the United Kingdom with its principal office at 9th Floor, One Plantation Place, 30 Fenchurch Street, London, EC3M 3BD (Royal Compl. ¶ 1). Although originally filed separately, these four cases were consolidated into a single action on August 8, 2006. (Aug. 8, 2006 Stipulation Order to Consolidate.)

[2] The shipment was made pursuant to "through bills of lading" whereby the carrier and shipper contracted for transportation across the ocean and to inland destinations under a contract of carriage.

(d) "Connecting Carrier" means carriers (other than Carrier), contracted by or acting on behalf of Carrier, participating in Carriage of Goods by land, water or air under this Bill of Lading ...

(h) "Merchant" includes the shipper, consignor, consignee, owner and receiver of Goods ....

Clause 2 (Governing Law and Jurisdiction)

The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein, and any action thereunder or in connection with Carriage of Goods shall be brought before the Tokyo District Court in Japan, to whose jurisdiction Merchant irrevocably consent [sic].

Clause 5 (Sub-Contracting: Exemptions, Immunities, Limitations, etc. of Participant(s))

(1) Carrier shall be entitled to sub-contract on any terms whatsoever Carriage, including without limitation, the loading, unloading, storing, warehousing, handling and any and all duties whatsoever undertaken by Carrier in relation to Goods by any of the following: (I) any Connecting Carrier ... (III) sub-contractors, ... agents and independent contractors ...

(2) Merchant undertakes that ... [w]ithout prejudice to the foregoing, every such vessel and Such Participant(s) shall have the benefit of all provisions herein benefitting Carrier as if such provisions were expressly for their benefit; and in entering into this contract, Carrier, to the extent of those provisions,

> does so not only on its own behalf, but also as agent and trustee of such vessel and Participant(s).

(Declaration of Alan Nakazawa ("Nakazawa Decl."), Ex. A at A-5.)

Plaintiffs and Defendant Kawasaki also entered into service contracts whereby Plaintiffs agreed to ship a minimum quantity of containers and Kawasaki agreed to transport the cargo at a specified rate. (Declaration of Dennis A. Cammarano ("Cammarano Decl."), Exs. 2-5.)

The cargo was loaded on board Kawasaki's ocean carriers in Shanghai and Hong Kong, and was carried across the Pacific Ocean to Long Beach where it was turned over to K-Line. K-Line subsequently delivered the cargo to Union Pacific Railroad Company ("UP"), with whom it had subcontracted to carry the cargo by rail to its final destination.

The contract between K-Line and UP was made pursuant to the Exempt Rail Transportation Agreement and the Master Intermodal Transportation Agreement ("MITA"). (Declaration of Sherry Johnson ("Johnson Decl."), Exs. A, B.) Section 1, Item 1.1D of MITA provides that MITA and the agreements and contracts referencing MITA are made pursuant to 49 U.S.C. § 10709. (Johnson Decl. Ex. B at B-49.)

The cargo was allegedly damaged or destroyed during a train derailment in Tyrone, Oklahoma on April 21, 2005. (Regal Compl. ¶ 9.) Plaintiffs brought suit in Los Angeles Superior Court, alleging that Defendants failed to carry, handle, monitor, and deliver the cargo so that it would be maintained in the same condition as when it was received. (Regal Compl. ¶ 9.) Defendant UP separately removed each Plaintiff's action to federal court in May of 2006.

III. LEGAL STANDARD

A motion to dismiss premised on the enforcement of a forum selection clause is treated in the same manner as a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3). *R.A. Argueta v. Banco Mexicano S.A.*, 87 F.3d 320, 324 (9th Cir.1996). The Court is therefore permitted to "consider facts outside the pleadings." *Id.*

Interpretation and enforcement of contractual forum selection clauses are procedural issues to be decided under federal law. *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 513 (9th Cir.1988). Forum selection clauses are presumptively valid under federal law, and should not be set aside unless the party challenging the clause demonstrates that enforcement would be unreasonable and unjust. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12, 15, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

A forum selection clause is "unreasonable" if (1) it was incorporated into the contract as a result of fraud, undue influence, or overweening bargaining power, *id.* at 12-13, 92 S.Ct. 1907, (2) the selected forum is so "gravely difficult and inconvenient" that the complaining party will "for all practical purposes be deprived of its day in court," *id.* at 18, 92 S.Ct. 1907, or (3) enforcement of the clause would contravene a strong public policy of the forum in which the suit is brought. *Id.* at 15, 92 S.Ct. 1907. In order to establish that a forum selection clause is unreasonable, the non-moving party has the "heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient that the party would effectively be denied a meaningful day in court." *Pelleport Investors, Inc. v. Budco Quality Theatres, Inc.*, 741 F.2d 273, 281 (9th Cir.1984) (citing *Bremen*, 407 U.S. at 18, 92 S.Ct. 1907).

IV. ANALYSIS

Kawasaki, K-Line, and UP's motion to dismiss is GRANTED because (1) the forum selection clause is *prima facie* enforceable, (2) the Carmack Amendment's venue provision does not apply, and (3) Defendants did not contractually agree to venue in New York.

A. The Forum Selection Clause in the K-Line Bill of Lading is Enforceable and Applies to Plaintiff's Claims

The Court finds none of the benchmarks necessary for invalidating a forum selection clause: (1) there is no evidence of fraud, etc.; (2) Plaintiffs would not suffer any undue inconvenience, other than the expense of litigating in Tokyo, if the forum selection clause is enforced (*see Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 535-36, 115 S.Ct. 2322, 132 L.Ed.2d 462 (1995)) (holding that increased cost and inconvenience are insufficient reasons to invalidate foreign forum selection clauses); *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1339 (9th Cir.1997) (same); and (3) there is no public policy favoring litigation in the Central District of California. Indeed, the Supreme Court and Ninth Circuit have both held comparable clauses to be valid. *See Sky Reefer*, 515 U.S. at 540-41, 115 S.Ct. 2322 (holding that a Tokyo arbitration clause was *prima facie* valid)[3]; *Kukje Hwajae Ins. Co. v. M/V Hyundai Liberty*, 408 F.3d 1250, 1255 (9th Cir.2005) (holding that the district court abused its discretion when it failed to enforce a Korean forum selection clause). Nor have Plaintiffs argued that enforcing the forum selection clause would be

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[3] The same principles and analysis apply to both foreign arbitration clauses and foreign forum selection clauses. *Sky Reefer*, 515 U.S. at 534, 115 S.Ct. 2322; *Fireman's Fund*, 131 F.3d at 1336.

unreasonable. Plaintiffs have consequently failed to satisfy their "heavy burden of showing that trial in the chosen forum would be so difficult and inconvenient" that they "effectively [would] be denied a meaningful day in court." *Pelleport Investors, Inc.*, 741 F.2d at 281.

Additionally, the forum selection clause applies to Plaintiffs' claims. Plaintiffs are "Merchants" under the terms of the Bills of Lading and are thus subject to their terms. By alleging that the cargo was carried under the K-Line Bills of Lading and that Defendants breached the Bills of Lading when the cargo was damaged (*see* Compl. ¶¶ 7, 16), Plaintiffs accepted the terms of the Bills of Lading and became bound by them. *See All Pac. Trading Corp. v. Vessel M/V Hanjin Yosu*, 7 F.3d 1427, 1432 (9th Cir.1993). The Court therefore concludes that the Tokyo District forum selection clause in the K-Line Bills of Lading is valid and enforceable.

B. K-Line and UP are Entitled to the Benefit of the Bills of Lading Under the Himalaya Clauses[4] Contained Therein

Although the forum selection clause is included only in Kawasaki's Bills of Lading, both K-Line and UP are nevertheless entitled to its benefits. Clause 5 extends the benefits of those contracts to sub-contractors and agents. Himalaya Clauses of this type are valid and enforceable. *See, e.g., Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31-32, 125 S.Ct. 385, 160 L.Ed.2d 283 (2004); *Inst. of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 766-67 (9th

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[4] A "Himalaya Clause" is a clause in an ocean bill of lading that extends the benefit of the bill's defenses and limitations to downstream parties who have sub-contracted to perform the services contemplated by the bill. *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 450 (9th Cir.1993).

Cir.1989). K-Line is Kawasaki's general agent in the United States (Johnson Decl. ¶ 5) and UP is a carrier with whom Kawasaki sub-contracted to provide overland transportation of the cargo (*see* Johnson Decl., Exs. A, B). Both K-Line and UP are consequently express beneficiaries of the K-Line Bills of Lading and therefore entitled to the benefit of the forum selection clause.

C. The Carmack Amendment Does Not Apply to Kawasaki, K-Line, or UP

Plaintiff contends that the present action is wholly governed by the Carmack Amendment, 49 U.S.C. § 11706 *et seq.*, which severely limits venue and would prohibit bringing this action before the Tokyo District Court.

The Carmack Amendment governs the liability of rail carriers for carriage by land and water under receipts and bills of lading. The statute provides that "[a] rail carrier ... shall issue a receipt or bill of lading for property it receives for transportation" and that the "rail carrier and any other carrier that delivers the property and is providing transportation ... are liable to the person entitled to recover under the receipt or bill of lading" for any "actual loss or injury to the property caused by- (1) the receiving rail carrier; (2) the delivering rail carrier; or (3) another rail carrier over whose line or route the property is transported in the United States ...."49 U.S.C. § 11706(a).

The Carmack Amendment includes a special venue requirement.

> A civil action under this section may only be brought—
>
> (i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

49 U.S.C. § 11706(d)(2)(A). Thus, the Carmack Amendment restricts venue for actions arising under § 11706.

The statutory history further supports the conclusion that Congress intended to restrict venue for actions against rail carriers. Prior to the 1980 Amendment to the Carmack Act, plaintiffs were able to bring suit against carriers in any judicial district where the carrier operated. Recognizing that this approach made "venue ... virtually uncontrollable and frequently, inconvenient," Congress amended the Act to restrict such action. *See* H.R.Rep. No. 96-1430, at 102 (1980). If applicable, the Carmack Amendment would limit venue in this case to California, Oklahoma, or Wisconsin, and render unenforceable the Tokyo District Court forum selection clause.

The Carmack Amendment's venue provision, however, does not apply to either the overseas or inland leg of the cargo shipment. The Carmack Amendment "encompasses the *inland leg* of an overseas shipment conducted under a single 'through' bill of lading," such as the one in this case "to the extent that the shipment runs beyond the dominion of the Carriage of Goods by Sea Act" ("COGSA"), 46

U.S.C. app. §§ 1300-1315. *Neptune Orient Lines, Ltd. v. Burlington N. & Santa Fe Ry. Co.*, 213 F.3d 1118, 1119 (9th Cir.2000) (emphasis added). The overseas leg of the cargo transport is thus subject to COGSA, which governs the rights and liabilities of shippers and ocean carriers and "applies to all cargo shipments which are carried by sea, to or from the United States." *Mori Seiki USA. Inc.*, 990 F.2d at 447. Under COGSA, cargo is in carriage "from the time when the goods are loaded on to the time when they are discharged from the ship." 46 U.S.C. app. § 1301(e). During this time period, COGSA applies as a matter of law. *See Hoegh Lines v. Green Truck Sales, Inc.*, 298 F.2d 240, 242 (9th Cir.1962). COGSA, unlike the Carmack Amendment, does not limit venue. The Tokyo District Court forum selection clause is therefore valid as to the overseas portion of the cargo transport.

Although the rail portion of interstate transport would typically fall under the auspices of the Carmack Amendment, the Bills of Lading here were made pursuant to 49 U.S.C. § 10709. Section 10709 is part of the Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895. The Act provides that "[n]othing in ... section 11706 of this title [the Carmack Amendment] shall prevent rail carriers from offering alternative terms." 49 U.S.C. § 10502(e). Courts have interpreted this provision to mean that carriers and shippers may contract out of the Carmack Amendment's provisions, either in whole or in part. *See, e.g., Co-Operative Shippers, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 840 F.2d 447 (7th Cir.1988); *Yamazen U.S.A., Inc. v. Chi. & Nw. Transp. Co.*, 790 F.2d 621 (7th Cir.1986); *Ferrostaal, Inc. v. Union Pac. R.R. Co.*, 109 F.Supp.2d 146 (S.D.N.Y.2000).

Section 10709 provides:

> (a) [R]ail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.
>
> . . .
>
> (c)(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless *the parties otherwise agree.*

(emphasis added). Section 10709 thus specifically contemplates that the parties to a rail service contract may contractually agree to litigate in a forum other than that provided by the Carmack Amendment. *See Dow Chem. Co. v. Union Pac. Corp.*, 8 F.Supp.2d 940, 941 (S.D.Tex.1998) ("It is clear that the purpose of § 10709 is to allow parties the ability to alter federal mandates, or to avoid federal control and oversight over rail contracts."). The parties in this case contracted to litigate all claims in the Tokyo District Court and thereby rendered inoperable the Carmack Amendment's venue provision.

4. Kawasaki and K-Line Did Not Contract for a United States Venue

Finally, the service contracts between Plaintiffs and Kawasaki do not apply to the present action. The service contracts provide that (1) the Plaintiffs agree to ship a minimum number of containers from certain points of origin to certain destinations at specified rates, and (2) Defendant Kawasaki agrees to carry any such cargo at the specified rates. (Cammarano Decl., Exs. 2-5.) In the event of any legal dispute or breach,

the service contracts provide that "[t]he substantive law of the state of New York shall govern *this Contract* and the parties submit to the jurisdiction of the U.S. District Court for the Southern District of New York."(Cammarano Decl., Ex. 2 at ¶ XII (emphasis added).) Finally, the service contracts provide that "[a]ll terms and conditions ... of Carrier's applicable Bill of Lading form ... shall apply to all shipments hereunder, notwithstanding any term of this contract." (Cammarano Decl., Ex. 2 at ¶ VIII.) By their terms, the service contracts govern only claims for breach of their pricing and shipping provisions. The service contracts do not extend to claims for cargo damage, nor do they modify the terms and conditions set forth in the Bills of Lading. The Bills of Lading are the applicable contracts of carriage governing liability for cargo damage, and the service contracts' provisions for New York jurisdiction are therefore inapplicable to the present case.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' motion to dismiss pursuant to the Tokyo District Court forum selection clause.

IT IS SO ORDERED.

Carriage of Goods by Sea Act
46 U.S.C.A. §30701 Notes

"Bills of lading subject to chapter [note]

"Every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this chapter [this note].

"Sec. 1. Definitions

"When used in this chapter [this note]—

"(a) The term 'carrier' includes the owner or the charterer who enters into a contract of carriage with a shipper.

"(b) The term 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

"(c) The term 'goods' includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

"(d) The term 'ship' means any vessel used for the carriage of goods by sea.

"(e) The term 'carriage of goods' covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

"Sec. 2. Duties and rights of carrier

"Subject to the provisions of section 1306 of this title [section 6 of this note], under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities set forth in sections 1303 and 1304 of this title [sections 3 and 4 of this note].

"Sec. 3. Responsibilities and liabilities of carrier and ship

"(1) Seaworthiness

"The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

"(a) Make the ship seaworthy;

"(b) Properly man, equip, and supply the ship;

"(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

"(2) Cargo

"The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

"(3) Contents of bill

"After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

"(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or

coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

"(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

"(c) The apparent order and condition of the goods: *Provided*, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

"(4) Bill as prima facie evidence

"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter [this note] shall be construed as repealing or limiting the application of any part of chapter 801 of Title 49.

"(5) Guaranty of statements

"The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

"(6) Notice of loss or damage; limitation of actions

"Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at

the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

"Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

"The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

"In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: *Provided*, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

"In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

"(7) 'Shipped' bill of lading

"After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a 'shipped' bill of lading: *Provided*, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of

the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a 'shipped' bill of lading.

"(8) Limitation of liability for negligence

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter [this note], shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

[In par. (4), "chapter 801 of title 49" substituted for "the Act of August 29, 1916, commonly known as the 'Pomerene Bills of Lading Act' [49 App. U.S.C.A. § 81 et seq.]" on authority of Pub.L. 103-272, § 6(b), July 5, 1994, 108 Stat. 1378, the first section of which enacted subtitles II, III, and V to X of Tile 49, Transportation.]

"Sec. 4. Rights and immunities of carrier and ship

"(1) Unseaworthiness

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance

with the provisions of paragraph (1) of section 1303 of this title [section 3 of this note]. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

"(2) Uncontrollable causes of loss

"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

"**(a)** Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

"**(b)** Fire, unless caused by the actual fault or privity of the carrier;

"**(c)** Perils, dangers, and accidents of the sea or other navigable waters;

"**(d)** Act of God;

"**(e)** Act of war;

"**(f)** Act of public enemies;

"**(g)** Arrest or restraint of princes, rulers, or people, or seizure under legal process;

"**(h)** Quarantine restrictions;

"**(i)** Act or omission of the shipper or owner of the goods, his agent or representative;

"**(j)** Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, That nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

"**(k)** Riots and civil commotions;

"(l) Saving or attempting to save life or property at sea;

"(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

"(n) Insufficiency of packing;

"(o) Insufficiency or inadequacy of marks;

"(p) Latent defects not discoverable by due diligence; and

"(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

"(3) Freedom from negligence

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

"(4) Deviations

"Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this chapter [this note] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however,* That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

"(5) Amount of liability; valuation of cargo

"Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of

the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

"By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

"Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

"(6) Inflammable, explosive, or dangerous cargo

"Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the

carrier without liability on the part of the carrier except to general average, if any.

"Sec. 5. Surrender of rights; increase of liabilities; charter parties; general average

"A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this chapter [this note], provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

"The provisions of this chapter [this note] shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this chapter [this note]. Nothing in this chapter [this note] shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average.

"Sec. 6. Special agreement as to particular goods

"Notwithstanding the provisions of sections 1303 to 1305 of this title [sections 3 to 5 of this note], a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: *Provided*, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

"Any agreement so entered into shall have full legal effect: *Provided*, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

"Sec. 7. Agreement as to liability prior to loading or after discharge

"Nothing contained in this chapter [this note] shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea.

"Sec. 8. Rights and liabilities under other provisions

"The provisions of this chapter [this note] shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 175, 181 to 183, and 183b to 188 of this title or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels.

"Sec. 9. Discrimination between competing shippers

"Nothing contained in this chapter [this note] shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this chapter [this

note]; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 1305 of this title [section 5 of this note]; or (c) in any other way prohibited by the Shipping Act, 1916, as amended.

"Sec. 10. [Formerly set out as 49 App. U.S.C.A. § 25, and repealed by Sept. 18, 1940, c. 722, T. I, § 14(a), 54 Stat. 919.]

"Sec. 11. Weight of bulk cargo

"Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this chapter [this note], the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper.

"Sec. 12. Liabilities before loading and after discharge; effect on other laws

"Nothing in this chapter [this note] shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter [this note], insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

"Sec. 13. Scope of chapter [note]; 'United States'; 'foreign trade'

"This chapter [this note] shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this chapter [this note] the term 'United States' includes its districts, territories, and possessions. The term 'foreign trade' means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this chapter [this note] shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: *Provided, however,* That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this chapter [this note], shall be subjected hereto as fully as if subject hereto by the express provisions of this chapter [this note]: *Provided further,* That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this chapter [this note].

[A proviso in second sentence that the Philippine Legislature might by law exclude its application to transportation to or from ports of the Philippine Islands was omitted in view of Proc. No. 2695, set out as a note under § 1394 of Title 22, Foreign Relations and Intercourse, which proclaimed the independence of the Philippines.]

"Sec. 14. Suspension of provisions by President

"Upon the certification of the Secretary of Transportation that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of sections 1301 to 1308 of this title [sections 1 to 8 of this note], or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclamation, suspend any or all provisions of said sections for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of said sections, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

"Any contract for the carriage of goods by sea, subject to the provisions of this chapter [this note], effective during any period when sections 1301 to 1308 of this title [sections 1 to 8 of this note], or any part thereof, are suspended, shall be subject to all provisions of law now or hereafter applicable to that part of said sections which may have thus been suspended.

"Sec. 15. Effective date; retroactive effect

"This chapter [this note] shall take effect ninety days after April 16, 1936; but nothing in this chapter [this note] shall apply during a period not to exceed one year following April 16, 1936, to any contract for the carriage of goods by sea, made before April 16, 1936, nor to any bill of lading or similar document of title

issued, whether before or after such date in pursuance of any such contract as aforesaid.

"Sec. 16. Short title

"This chapter [this note] may be cited as the 'Carriage of Goods by Sea Act.'"

49 U.S.C.A. §10501 (2009)

§ 10501. General jurisdiction

(a)(1) Subject to this chapter, the Board has jurisdiction over transportation by rail carrier that is—

(A) only by railroad; or

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment.

(2) Jurisdiction under paragraph (1) applies only to transportation in the United States between a place in—

(A) a State and a place in the same or another State as part of the interstate rail network;

(B) a State and a place in a territory or possession of the United States;

(C) a territory or possession of the United States and a place in another such territory or possession;

(D) a territory or possession of the United States and another place in the same territory or possession;

(E) the United States and another place in the United States through a foreign country; or

(F) the United States and a place in a foreign country.

* * *

49 U.S.C. §10502 (2000)

§ 10502. Authority to exempt rail carrier transportation

(a) In a matter related to a rail carrier providing transportation subject to the jurisdiction of the Board under this part, the Board, to the maximum extent consistent with this part, shall exempt a person, class of persons, or a transaction or service whenever the Board finds that the application in whole or in part of a provision of this part—

(1) is not necessary to carry out the transportation policy of section 10101 of this title; and

(2) either—

(A) the transaction or service is of limited scope; or

(B) the application in whole or in part of the provision is not needed to protect shippers from the abuse of market power.

(b) The Board may, where appropriate, begin a proceeding under this section on its own initiative or on application by the Secretary of Transportation or an interested party. The Board shall, within 90 days after receipt of any such application, determine whether to begin an appropriate proceeding. If the Board decides not to begin a class exemption proceeding, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of an application under this subsection shall be completed within 9 months after it is begun.

(c) The Board may specify the period of time during which an exemption granted under this section is effective.

(d) The Board may revoke an exemption, to the

extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title. The Board shall, within 90 days after receipt of a request for revocation under this subsection, determine whether to begin an appropriate proceeding. If the Board decides not to begin a proceeding to revoke a class exemption, the reasons for the decision shall be published in the Federal Register. Any proceeding begun as a result of a request under this subsection shall be completed within 9 months after it is begun.

(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11706 of this title. Nothing in this subsection or section 11706 of this title shall prevent rail carriers from offering alternative terms nor give the Board the authority to require any specific level of rates or services based upon the provisions of section 11706 of this title.

(f) The Board may exercise its authority under this section to exempt transportation that is provided by a rail carrier as part of a continuous intermodal movement.

(g) The Board may not exercise its authority under this section to relieve a rail carrier of its obligation to protect the interests of employees as required by this part.

49 U.S.C. §10709 (2000)

§ 10709. Contracts

(a) One or more rail carriers providing transportation subject to the jurisdiction of the Board under this part may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions.

(b) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

(c)(1) A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part.

(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree. This section does not confer original jurisdiction on the district courts of the United States based on section 1331 or 1337 of title 28, United States Code.

(d)(1) A summary of each contract for the transportation of agricultural products (including grain, as defined in section 3 of the United States Grain Standards Act (7 U.S.C. 75) and products thereof) entered into under this section shall be filed with the Board, containing such nonconfidential information as the Board prescribes. The Board shall publish special rules for such contracts in order to ensure that the

essential terms of the contract are available to the general public.

(2) Documents, papers, and records (and any copies thereof) relating to a contract described in subsection (a) shall not be subject to the mandatory disclosure requirements of section 552 of title 5.

(e) Any lawful contract between a rail carrier and one or more purchasers of rail service that was in effect on October 1, 1980, shall be considered a contract authorized by this section.

(f) A rail carrier that enters into a contract as authorized by this section remains subject to the common carrier obligation set forth in section 11101, with respect to rail transportation not provided under such a contract.

(g)(1) No later than 30 days after the date of filing of a summary of a contract under this section, the Board may, on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

(2)(A) A complaint may be filed under this subsection—

(i) by a shipper on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting rail carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

(B) In addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a

complaint may be filed by a shipper of agricultural commodities on the grounds that such shipper individually will be harmed because—

(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

(ii) the proposed contract constitutes a destructive competitive practice under this part.

In making a determination under clause (ii) of this subparagraph, the Board shall consider the difference between contract rates and published single car rates.

(C) For purposes of this paragraph, the term "unreasonable discrimination" has the same meaning as such term has under section 10741 of this title.

(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Board may establish, the Board shall determine whether the contract that is the subject of such proceeding is in violation of this section.

(B) If the Board determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a rail carrier, the Board shall, subject to the provisions of this section, order such rail carrier to provide rates and service substantially similar to the

contract at issue with such differentials in terms and conditions as are justified by the evidence.

(h)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products, but not including wood pulp, wood chips, pulpwood or paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC).

(2) The Board may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Board considers appropriate, if it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

(3)(A) This subsection shall cease to be effective after September 30, 1998.

(B) Before October 1, 1997, the National Grain Car Council and the Railroad-Shipper Transportation Advisory Council shall make recommendations to Congress on whether to extend the effectiveness of or otherwise modify this subsection.

49 U.S.C. §11706 (2000)

§ 11706. Liability of rail carriers under receipts and bills of lading

(a) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall issue a receipt or bill of lading for property it receives for transportation under this part. That rail carrier and any other carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Board under this part are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this subsection is for the actual loss or injury to the property caused by—

(1) the receiving rail carrier;

(2) the delivering rail carrier; or

(3) another rail carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading.

Failure to issue a receipt or bill of lading does not affect the liability of a rail carrier. A delivering rail carrier is deemed to be the rail carrier performing the line-haul transportation nearest the destination but does not include a rail carrier providing only a switching service at the destination.

(b) The rail carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was

issued is entitled to recover from the rail carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A rail carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, or rule in violation of this section is void.

(2) A rail carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on trains carrying passengers.

(3) A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part may establish rates for transportation of property under which—

(A) the liability of the rail carrier for such property is limited to a value established by written declaration of the shipper or by a written agreement between the shipper and the carrier; or

(B) specified amounts are deducted, pursuant to a written agreement between the shipper and the carrier, from any claim against the carrier with respect to the transportation of such property.

(d)(1) A civil action under this section may be brought in a district court of the United States or in a State court.

(2)(A) A civil action under this section may only be brought—

(i) against the originating rail carrier, in the judicial district in which the point of origin is located;

(ii) against the delivering rail carrier, in the judicial district in which the principal place of business of the person bringing the action is located if the delivering carrier operates a railroad or a route through such judicial district, or in the judicial district in which the point of destination is located; and

(iii) against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(B) In this section, "judicial district" means (i) in the case of a United States district court, a judicial district of the United States, and (ii) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) A rail carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part

of the claim specified in the notice. For the purposes of this subsection—

(1) an offer of compromise shall not constitute a disallowance of any part of the claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(2) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reasons for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

49 U.S.C. §14706 (2000)

§ 14706. Liability of carriers under receipts and bills of lading

(a) GENERAL LIABILITY.—

(1) MOTOR CARRIERS AND FREIGHT FORWARDERS.—A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 shall issue a receipt or bill of lading for property it receives for transportation under this part. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) FREIGHT FORWARDER.—A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service and uses a motor carrier providing transportation

subject to jurisdiction under subchapter I of chapter 135 to receive property from a consignor, the motor carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) APPORTIONMENT.—The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c) SPECIAL RULES.—

(1) MOTOR CARRIERS.—

(A) SHIPPER WAIVER.—Subject to the provisions of subparagraph (B), a carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 may, subject to the provisions of this chapter (including with respect to a motor carrier, the requirements of section 13710(a)), establish rates for the transportation of property (other than household goods described in section 13102(10)(A)) under which the liability of the carrier for such property is limited to a value established by written or electronic

declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

(B) CARRIER NOTIFICATION.—If the motor carrier is not required to file its tariff with the Board, it shall provide under section 13710(a)(1) to the shipper, on request of the shipper, a written or electronic copy of the rate, classification, rules, and practices upon which any rate applicable to a shipment, or agreed to between the shipper and the carrier, is based. The copy provided by the carrier shall clearly state the dates of applicability of the rate, classification, rules, or practices.

(C) PROHIBITION AGAINST COLLECTIVE ESTABLISHMENT.—No discussion, consideration, or approval as to rules to limit liability under this subsection may be undertaken by carriers acting under an agreement approved pursuant to section 13703.

(2) WATER CARRIERS.—If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(d) CIVIL ACTIONS.—

(1) AGAINST DELIVERING CARRIER.—A civil action under this section may be brought against a

delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State through which the defendant carrier operates.

(2) AGAINST CARRIER RESPONSIBLE FOR LOSS.—A civil action under this section may be brought against the carrier alleged to have caused the loss or damage, in the judicial district in which such loss or damage is alleged to have occurred.

(3) JURISDICTION OF COURTS.—A civil action under this section may be brought in a United States district court or in a State court.

(4) JUDICIAL DISTRICT DEFINED.—In this section, "judicial district" means—

(A) in the case of a United States district court, a judicial district of the United States; and

(B) in the case of a State court, the applicable geographic area over which such court exercises jurisdiction.

(e) MINIMUM PERIOD FOR FILING CLAIMS.—

(1) IN GENERAL.—A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date the carrier gives a person written notice that the carrier has disallowed any part of the claim specified in the notice.

(2) SPECIAL RULES.—For the purposes of this subsection—

(A) an offer of compromise shall not constitute a disallowance of any part of the

claim unless the carrier, in writing, informs the claimant that such part of the claim is disallowed and provides reasons for such disallowance; and

(B) communications received from a carrier's insurer shall not constitute a disallowance of any part of the claim unless the insurer, in writing, informs the claimant that such part of the claim is disallowed, provides reason for such disallowance, and informs the claimant that the insurer is acting on behalf of the carrier.

(f) LIMITING LIABILITY OF HOUSEHOLD GOODS CARRIERS TO DECLARED VALUE.—A carrier or group of carriers subject to jurisdiction under subchapter I or III of chapter 135 may petition the Board to modify, eliminate, or establish rates for the transportation of household goods under which the liability of the carrier for that property is limited to a value established by written declaration of the shipper or by a written agreement.

(g) MODIFICATIONS AND REFORMS.—

(1) STUDY.—The Secretary shall conduct a study to determine whether any modifications or reforms should be made to the loss and damage provisions of this section, including those related to limitation of liability by carriers.

(2) FACTORS TO CONSIDER.—In conducting the study, the Secretary, at a minimum, shall consider—

(A) the efficient delivery of transportation services;

(B) international and intermodal harmony;

(C) the public interest; and

(D) the interest of carriers and shippers.

(3) REPORT.—Not later than 12 months after January 1, 1996, the Secretary shall submit to Congress a report on the results of the study, together with any recommendations of the Secretary (including legislative recommendations) for implementing modifications or reforms identified by the Secretary as being appropriate.

Pub. L. No. 96-448, §10713
94 Stat. 1895 (1980)

An Act
To reform the economic regulation of railroads, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Staggers Rail Act of 1980".

* * *

CONTRACTS

Sec. 208. (a) Subchapter I of chapter 107 of title 49, United States Code, as amended by this Act, is further amended by adding at the end thereof the following new section:

§ 10713. Contracts

"(a) One or more rail carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may enter into a contract with one or more purchasers of rail services to provide specified services under specified rates and conditions. Such a rail carrier may not enter into a contract with purchasers of rail service except as provided in this section.

"(b) Each contract entered into under this section shall be filed with the Commission, together with a summary of the contract containing such nonconfidential information as the Commission

prescribes. The Commission shall publish special tariff rules for such contracts in order to assure that the essential terms of the contract are available to the general public in tariff format.

"(c) A contract filed under this section shall be approved by the Commission, as provided in subsection (e) of this section, unless the Commission determines in a proceeding under subsection (d) of this section that such contract is in violation of this section.

"(d)(1) No later than 30 days after the date of filing of a contract under this section, the Commission may, on its own initiative or on complaint, begin a proceeding to review such contract on the grounds described in this subsection.

"(2)(A) In the case of a contract other than a contract for the transportation of agricultural commodities (including forest products and paper), a complaint may be filed—

"(i) by a shipper only on the grounds that such shipper individually will be harmed because the proposed contract unduly impairs the ability of the contracting carrier or carriers to meet their common carrier obligations to the complainant under section 11101 of this title; or

"(ii) by a port only on the grounds that such port individually will be harmed because the proposed contract will result in unreasonable discrimination against such port.

"(B) In the case of a contract for the transportation of agricultural commodities (including forest products and paper), in addition to the grounds for a complaint described in subparagraph (A) of this paragraph, a complaint may be filed by a shipper on the

grounds that such shipper individually will be harmed because—

"(i) the rail carrier has unreasonably discriminated by refusing to enter into a contract with such shipper for rates and services for the transportation of the same type of commodity under similar conditions to the contract at issue, and that shipper was ready, willing, and able to enter into such a contract at a time essentially contemporaneous with the period during which the contract at issue was offered; or

"(ii) the proposed contract constitutes a destructive competitive practice under this subtitle.

In making a determination under clause (ii) of this subparagraph, the Commission shall consider the difference between contract rates and published single car rates.

"(C) For purposes of this paragraph, the term 'unreasonable discrimination' has the same meaning as such term has under section 10741 of this title.

"(3)(A) Within 30 days after the date a proceeding is commenced under paragraph (1) of this subsection, or within such shorter time period after such date as the Commission may establish, the Commission shall determine whether the contract that is the subject of such proceeding is in violation of this section.

"(B) If the Commission determines, on the basis of a complaint filed under paragraph (2)(B)(i) of this subsection, that the grounds for a complaint described in such paragraph have been established with respect to a carrier, the Commission shall, subject to the provisions of this section, order such carrier to provide rates and service substantially similar to the contract

at issue with such differentials in terms and conditions as are justified by the evidence.

"(e) Approval of a contract filed under this section shall be effective—

"(1) on the date the Commission expressly approves such contract, but in no event before the end of the 30-day period beginning on the date such contract is filed or after the end of the 60-day period beginning on such date; or

"(2) if the Commission has not disapproved such contract by the end of the 60-day period beginning on the date such contract is filed, at the end of such 60-day period.

"(f) The Commission may limit the right of a rail carrier to enter into future contracts under this section following a determination that additional contracts would impair the ability of the rail carrier to fulfill its common carrier obligations under section 11101 of this title.

"(g) The Commission may not require a rail carrier to violate the terms of a contract that has been approved under this section, except to the extent necessary to comply with section 11128 of this title.

"(h) A party to a contract entered into under this section shall have no duty in connection with services provided under such contract other than those duties specified by the terms of the contract.

"(i)(1) A contract that is approved by the Commission under this section, and transportation under such contract, shall not be subject to this subtitle, and may not be subsequently challenged before the Commission or in any court on the grounds that such contract violates a provision of this subtitle.

"(2) The exclusive remedy for any alleged breach of a contract entered into under this section shall be an action in an appropriate State court or United States district court, unless the parties otherwise agree.

"(j) The provisions of this section shall not affect the status of any lawful contract between a rail carrier and one or more purchasers of rail service that is in effect on the effective date of the Staggers Rail Act of 1980. Any such contract shall hereafter have the same force and effect as if it had been entered into in accordance with the provisions of this section. Nothing in this section shall affect the rights of the parties to challenge the existence of such a contract.

"(k)(1) Any rail carrier may, in accordance with the terms of this section, enter into contracts for the transportation of agricultural commodities (including forest products and paper) involving the utilization of carrier owned or leased equipment not in excess of 40 percent of the capacity of such carrier's owned or leased equipment by major car type (plain boxcars, covered hopper cars, gondolas and open top hoppers, coal cars, bulkhead flatcars, pulpwood rackcars, and flatbed equipment, including TOFC/COFC), except that in the case of a proposed contract between a class I carrier and a shipper originating an average of 1,000 cars or more per year during the prior 3-year period by major car type on a particular carrier, not more than 40 percent of carrier owned or leased equipment utilized on the average during the prior 3- year period may be used for such contract without prior authorization by the Commission.

"(2) The Commission may, on request of a rail carrier or other party or on its own initiative, grant such relief from the limitations of paragraph (1) of this subsection as the Commission considers appropriate, if

it appears that additional equipment may be made available without impairing the rail carrier's ability to meet its common carrier obligations under section 11101 of this title.

"(l) Service under a contract approved under this section shall be deemed to be a separate and distinct class of service, and the equipment used in the fulfillment of such a contract shall not be subject to car service decisions under section 11123 of this title.

"(m) The Commission shall establish a railroad contract rate advisory service. The advisory service shall—

"(1) compile and disseminate to interested parties nonconfidential summaries of the provisions of individual contract information relating to the provisions of contracts entered into under this section with regard to various goods, items, and commodities covered by such contracts;

"(2) provide the Commission and interested parties with advice regarding contracts; and

"(3) assess the impact on competition among shippers of variations between contract rates for various shipments and the published single car rates, and submit a report on such impact to the Congress not later than 90 days after the effective date of the Staggers Rail Act of 1980.".

(b) The section analysis for chapter 107 of title 49, United States Code, is amended by inserting immediately after the item relating to section 10712, as added by this Act, the following new item:

* * *

Pub. L. No. 96-448, §10505
94 Stat. 1912 (1980)

EXEMPTION

Sec. 213. Section 10505 of title 49, United States Code, is amended to read as follows:

§ 10505. Authority to exempt rail carrier transportation

* * *

"(e) No exemption order issued pursuant to this section shall operate to relieve any rail carrier from an obligation to provide contractual terms for liability and claims which are consistent with the provisions of section 11707 of this title. Nothing in this subsection or section 11707 of this title shall prevent rail carriers from offering alternative terms nor give the Commission the authority to require any specific level of rates or services based upon the provisions of section 11707 of this title.

* * *

Pub. L. No. 95-473, §11707
92 Stat. 1453 (1978)

§ 11707. Liability of common carriers under receipts and bills of lading

(a)(1) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under subchapter I, II, or IV of chapter 105 of this title shall issue a receipt or bill of lading for property it receives for transportation under this subtitle. That carrier and any other common carrier that delivers the property and is providing transportation or service subject to the jurisdiction of the Commission under subchapter I, II, or IV are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier, (2) the delivering carrier, or (3) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and applies to property reconsigned or diverted under a tariff filed under subchapter IV of chapter 107 of this title. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

(2) A freight forwarder is both the receiving and delivering carrier. When a freight forwarder provides service subject to this subtitle and uses a motor common carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title to receive property from a

consignor, the motor common carrier may execute the bill of lading or shipping receipt for the freight forwarder with its consent. With the consent of the freight forwarder, a motor common carrier may deliver property for a freight forwarder on the freight forwarder's bill of lading, freight bill, or shipping receipt to the consignee named in it, and receipt for the property may be made on the freight forwarder's delivery receipt.

(b) The carrier issuing the receipt or bill of lading under subsection (a) of this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

(c)(1) A common carrier may not limit or be exempt from liability imposed under subsection (a) of this section except as provided in this subsection. A limitation of liability or of the amount of recovery or representation or agreement in a receipt, bill of lading, contract, rule, or tariff filed with the Commission in violation of this section is void.

(2) If loss or injury to property occurs while it is in the custody of a water carrier, the liability of that carrier is determined by its bill of lading and the law applicable to water transportation. The liability of the initial or delivering carrier is the same as the liability of the water carrier.

(3) A common carrier of passengers may limit its liability under its passenger rate for loss or injury of baggage carried on passenger trains, boats, or motor

vehicles, or on trains, or boats, or motor vehicles carrying passengers.

(4) A common carrier may limit its liability for loss or injury of property transported under section 10730 of this title.

(d) A civil action under this section may be brought against a delivering carrier in a district court of the United States or in a State court. Trial, if the action is brought in a district court of the United States is in a judicial district, and if in a State court, is in a State, through which the defendant carrier operates a railroad or route.

(e) A carrier may not provide by rule, contract, or otherwise, a period of less than 9 months for filing a claim against it under this section and a period of less than 2 years for bringing a civil action against it under this section. The period for bringing a civil action is computed from the date that person receives written notice from the carrier that it has disallowed any part of the claim specified in the notice.

* * *

[92 Stat. 1466 (1978)]

LEGISLATIVE PURPOSE AND CONSTRUCTION

Sec. 3. (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

(b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in a regulation, order,

or other law, is deemed to refer to the corresponding provision enacted by this Act.

(c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all valid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

Pub. L. No. 95-473, §10501
92 Stat. 1359 (1978)

An Act

To revise, codify, and enact without substantive change the Interstate Commerce Act and related laws as subtitle IV of title 49, United States Code, "Transportation".

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That certain general and permanent laws of the United States, related to transportation, are revised, codified, and enacted as title 49, United States Code, "Transportation", as follows:

TITLE 49-TRANSPORTATION

* * *

SUBCHAPTER I-RAIL, RAIL-WATER, EXPRESS, AND PIPELINE CARRIER TRANSPORTATION

§ 10501. General jurisdiction

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

(1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—

(A) only by railroad;

(B) by railroad and water, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment; or

(C) by pipeline or by pipeline and railroad or water when transporting a commodity other than water, gas, or oil; and

(2) to the extent the transportation is in the United States and is between a place in—

(A) a State and a place in another State;

(B) the District of Columbia and another place in the District of Columbia;

(C) a State and a place in a territory or possession of the United States;

(D) a territory or possession of the United States and a place in another such territory or possession;

(E) a territory or possession of the United States and another place in the same territory or possession;

(F) the United States and another place in the United States through a foreign country; or

(G) the United States and a place in a foreign country.

* * *

49 U.S.C. §1 (1976)

§ 1. Regulation in general; car service; alteration of line

(1) Carriers subject to regulation

The provisions of this chapter shall apply to common carriers engaged in–

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; or

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or partly by pipe line and partly by railroad or by water—

(c) Repealed. June 19, 1934, ch. 652, title VI, § 602(b), 48 Stat. 1102.

From one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States through a foreign country to any other place in the United States, or from or to any place in the United States to or from a foreign country, but only insofar as such transportation takes place within the United States.

* * *

An Act to Regulate Commerce, ch. 3591, 34 Stat. 593 (1906)

CHAP. 3591.—An Act To amend an Act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

* * *

SEC. 7. That section twenty of said Act be amended so as to read as follows:

"SEC. 20. . . . .

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such

property, as may be evidenced by any receipt, judgment, or transcript thereof."

* * *

An Act to Regulate Commerce, ch. 176, 34 Stat. 1196 (1915)

CHAP. 176.—An Act To amend an Act entitled "An act to amend an Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six.

Be it enacted by the Senate and House of Representatives of the Untied States of America in Congress assembled, That so much of section seven of an Act entitled "An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission," approved June twenty-ninth, nineteen hundred and six, as reads as follows, to wit:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or a bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered, or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law," be, and the same is hereby, amended so as to read as follows, to wit:

"That any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or

representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: *Provided, however,* That if the goods are hidden from view by wrapping, boxing, or other means, and the carrier is not notified as to the character of the goods, the carrier may require the shipper to specifically state in writing the value of the goods, and the carrier shall not be liable beyond the amount so specifically stated, in which case the Interstate Commerce Commission may establish and maintain rates for transportation, dependent upon the value of the property shipped as specifically stated in writing by the shipper. Such rates shall be published as are other rate schedules: *Provided further,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further,* That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

SEC. 2. That this Act shall take effect and be in force from ninety days after its passage.

Approved, March 4, 1915.

49 U.S.C. §20 (1976)

* * *

(11) Liability of initial and delivering carrier for loss; limitation of liability; notice and filing of claim

Any common carrier, railroad, or transportation company subject to the provisions of this chapter receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State, Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory, or any common carrier, railroad, or transportation company delivering said property so received and transported shall be liable to the lawful holder of said receipt or bill of lading or to any party

entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is declared to be unlawful and void: *Provided*, That if the loss, damage, or injury occurs while the property is in the custody of a carrier by water the liability of such carrier shall be determined by the bill of lading of the carrier by water and by and under the laws and regulations applicable to transportation by water, and the liability of the initial or delivering carrier shall be the same as that of such carrier by water: *Provided, however*, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary livestock, received for transportation concerning which the carrier shall have been or shall be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in

writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section 10 of this title; and any tariff schedule which may be filed with the Commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared and agreed upon; and the Commission is empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term "ordinary livestock" shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: *Provided further*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: *Provided further*, That all actions brought under and by virtue of this paragraph against the delivering carrier shall be brought, and may be maintained, if in a district court of the United States, only in a district, and if in a State court, only in a State through or into which the defendant carrier operates a line of railroad: *Provided further*, That it shall be unlawful for any such receiving or delivering common carrier to provide by rule, contract, regulation, or otherwise a shorter period for the filing of claims than nine months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice: *And provided*

further, That for the purposes of this paragraph and of paragraph (12) of this section the delivering carrier shall be construed to be the carrier performing the line-haul service nearest to the point of destination and not a carrier performing merely a switching service at the point of destination: *And provided further*, That the liability imposed by this paragraph shall also apply in the case of property reconsigned or diverted in accordance with the applicable tariffs filed as in this chapter provided.

* * *

Interstate Commerce Act Amendment, ch. 498, 49 Stat. 543 (1935)

AN ACT

To amend the Interstate Commerce Act, as amended, by providing for the regulation of the transportation of passengers and property by motor carriers operating in interstate or foreign commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Interstate Commerce Act, as amended, herein referred to as "Part I", is hereby amended by inserting at the beginning thereof the caption "part I", and by substituting for the words "this Act", wherever they occur, the words "this part", but such part I may continue to be cited as the "Interstate Commerce Act", and said Interstate Commerce Act is hereby further amended by adding the following part II:

"PART II

"SHORT TITLE

"SEC. 201. This part may be cited as the 'Motor Carrier Act, 1935'.

"DECLARATION OF POLICY AND DELEGATION OF JURISDICTION

"SEC. 202. (a) It is hereby declared to be the policy of Congress to regulate transportation by motor carriers in such manner as to recognize and preserve the inherent advantages of, and foster sound and economic conditions in, such transportation and among such carriers in the public interest; promote adequate, economical, and efficient service by motor carriers, and

reasonable charges therefor, without unjust discriminations, undue preferences or advantages, and unfair or destructive competitive practices; improve the relations between, and coordinate transportation by and regulation of, motor carriers and other carriers; develop and preserve a highway transportation system properly adapted to the needs of the commerce of the United States and of the national defense; and cooperate with the several States and the duly authorized officials thereof and with any organization of motor carriers in the administration and enforcement of this part.

"(b) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.

"(c) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

* * *

"RECEIPTS OR BILLS OF LADING

"SEC. 219. The provisions of section 20 (11) of part I shall apply with like force and effect to receipts or bills of lading of common carriers by motor vehicle.

* * *

49 C.F.R. §1090.2

§ 1090.2 Exemption of rail and highway TOFC/COFC service.

Except as provided in 49 U.S.C. 10505 (e) and (g), 109229(1), and 10530, rail TOFC/COFC service and highway TOFC/COFC service provided by a rail carrier either itself or jointly with a motor carrier as part of a continuous intermodal freight movement is exempt from the requirements of 49 U.S.C. subtitle IV, regardless of the type, affiliation, or ownership of the carrier performing the highway portion of the service. Motor carrier TOFC/COFC pickup and delivery services arranged independently with the shipper or receiver (or its representative/agent) and performed immediately before or after a TOFC/COFC movement provided by a rail carrier are similarly exempt. Tariffs heretofore applicable to any transportation service exempted by this section shall no longer apply to such service. The exemption does not apply to a motor carrier service in which a rail carrier participates only as the motor carrier's agent (Plan I TOFC/COFC), nor does the exemption operate to relieve any carrier of any obligation it would otherwise have, absent the exemption, with respect to providing contractual terms for liability and claims.

46 C.F.R. §520.1

§ 520.1 Scope and purpose.

(a) *Scope.* The regulations of this part govern the publication of tariffs in automated systems by common carriers and conferences in the waterborne foreign commerce of the United States. They cover the transportation of property by such carriers, including through transportation with inland carriers. They implement the tariff publication requirements of section 8 of the Shipping Act of 1984 ("Act"), as modified by the Ocean Shipping Reform Act of 1998 and section 424 of Public Law 105-258.

* * *

46 C.F.R. §520.2

§ 520. 2 Definitions.

The following definitions shall apply to this part:

Act means the Shipping Act of 1984, as amended by the Ocean Shipping Reform Act of 1998.

Amendment means any change, alteration, correction or modification of an existing tariff.

Assessorial charge means the amount that is added to the basic ocean freight rate.

BTA means the Commission's Bureau of Trade Analysis or its successor bureau.

Bulk cargo means cargo that is loaded and carried in bulk without mark or count in a loose unpackaged form, having homogeneous characteristics. Bulk cargo loaded into intermodal equipment, except LASH or Seabee barges, is subject to mark and count and is, therefore, subject to the requirements of this part.

Co-loading means the combining of cargo by two or more NVOCCs for tendering to an ocean common carrier under the name of one or more of the NVOCCs.

Combination rate means a rate for a shipment moving under intermodal transportation which is computed by the addition of a TRI, and an inland rate applicable from/to inland points not covered by the TRI.

Commission means the Federal Maritime Commission.

Commodity description means a comprehensive description of a commodity listed in a tariff, including a brief definition of the commodity.

Commodity description number means a number that may be used to identify a commodity description.

Commodity index means an index of the commodity descriptions contained in a tariff.

Commodity rate means a rate for shipping to or from specific locations a commodity or commodities specifically named or described in the tariff in which the rate or rates are published.

Common carrier means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) Utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker or by a vessel when primarily engaged in the carriage of perishable agricultural commodities:

(i) If the common carrier and the owner of those commodities are wholly-owned, directly or indirectly, by a person primarily engaged in the marketing and distribution of those commodities and

(ii) Only with respect to the carriage of those commodities.

Conference means an agreement between or among two or more ocean common carriers which provides for the fixing of and adherence to uniform tariff rates, charges, practices and conditions of service relating to

the receipt, carriage, handling and/or delivery of passengers or cargo for all members, but the term does not include joint service, consortium, pooling, sailing, or transshipment agreements.

Consignee means the recipient of cargo from a shipper; the person to whom a transported commodity is to be delivered.

Container means a demountable and reusable freight-carrying unit designed to be transported by different modes of transportation and having construction, fittings, and fastenings able to withstand, without permanent distortion or additional exterior packaging or containment, the normal stresses that apply on continuous all-water and intermodal transportation. The term includes dry cargo, ventilated, insulated, refrigerated, flat rack, vehicle rack, liquid tank, and open-top containers without chassis, but does not include crates, boxes or pallets.

Controlled carrier means an ocean common carrier that is, or whose operating assets are, directly or indirectly owned or controlled by a government; ownership or control by a government shall be deemed to exist with respect to any common carrier if:

(1) A majority portion of the interest in the common carrier is owned or controlled in any manner by that government, by an agency thereof, or by any public or private person controlled in any manner by that government, by any agency thereof, or by any public or private person controlled by that government; or

(2) That government has the right to appoint or disapprove the appointment of a majority of the directors, the chief operating officer or the chief executive officer of the common carrier.

Effective date means the date upon which a published tariff or tariff element is scheduled to go into effect. Where there are multiple publications to a tariff element on the same day, the last element published with the same effective date is the one effective for that day.

Expiration date means the last day after which the entire tariff or tariff element is no longer in effect.

Foreign commerce means that commerce under the jurisdiction of the Act.

Forest products means forest products including, but not limited to, lumber in bundles, rough timber, ties, poles, piling, laminated beams, bundled siding, bundled plywood, bundled core stock or veneers, bundled particle or fiber boards, bundled hardwood, wood pulp in rolls, wood pulp in unitized bales, paper and paper board in rolls or in pallet or skid-sized sheets, liquid or granular by-products derived from pulping and papermaking, and engineered wood products.

Harmonized Code means the coding provisions of the Harmonized System.

Harmonized System means the Harmonized Tariff Schedule of the United States ("U.S. HTS"), based on the international Harmonized System, administered by the U.S. Customs Service for the U.S. International Trade Commission, and Schedule B, administered by the U.S. Census Bureau.

Inland point means any city and associated state/province, country, U.S. ZIP code, or U.S. ZIP code range, which lies beyond port terminal areas. (A city may share the name of a port: the immediate ship-side and terminal area is the port, but the rest of the city is considered an inland point.)

Inland rate means a rate specified from/to an ocean port to/from an inland point, for specified modes of overland transportation.

Inland rate table means a structured matrix of geographic inland locations (points, postal codes/postal code ranges, etc.) on one axis and transportation modes (truck, rail, etc.) on the other axis, with the inland rates specified at the matrix row and column intersections.

Intermodal transportation means continuous through transportation involving more than one mode of service (e.g., ship, rail, motor, air), for pickup and/or delivery at a point beyond the area of the port at which the vessel calls. The term "intermodal transportation" can apply to "through transportation (at through rates)" or transportation on through routes using combination rates.

Joint rates means rates or charges established by two or more common carriers for ocean transportation over the combined routes of such common carriers.

Local rates means rates or charges for transportation over the route of a single common carrier (or any one common carrier participating in a conference tariff), the application of which is not contingent upon a prior or subsequent movement.

Location group means a logical collection of geographic points, ports, states/provinces, countries, or combinations thereof, which is primarily used to identify, by location group name, a group that may represent tariff origin and/or destination scope and TRI origin and/or destination.

Loyalty contract means a contract with an ocean common carrier or agreement by which a shipper obtains lower rates by committing all or a fixed portion

of its cargo to that carrier or agreement and the contract provides for a deferred rebate arrangement.

Motor vehicle means a wheeled vehicle whose primary purpose is ordinarily the non-commercial transportation of passengers, including an automobile, pickup truck, minivan, or sport utility vehicle.

Ocean common carrier means a common carrier that operates, for all or part of its common carrier service, a vessel on the high seas or the Great Lakes between a port in the United States and a port in a foreign country, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel-tanker.

Ocean transportation intermediary means an ocean freight forwarder or a non-vessel-operating common carrier. For purposes of this part,

(1) *Ocean freight forwarder* means a person that—

(i) In the United States, dispatches shipments from the United States via a common carrier and books or otherwise arranges space for those shipments on behalf of shippers; and

(ii) Processes the documentation or performs related activities incident to those shipments; and

(2) *Non-vessel-operating common carrier ("NVOCC")* means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier.

Open rate means a rate on a specified commodity or commodities over which a conference relinquishes or suspends its ratemaking authority in whole or in part, thereby permitting each individual ocean common

carrier member of the conference to fix its own rate on such commodity or commodities.

Organization name means an entity's name on file with the Commission and for which the Commission assigns an organization number.

Organization record means information regarding an entity, including its name, address, and organization type.

Origin scope means a location group defining the geographic range of cargo origins covered by a tariff.

Person includes individuals, firms, partnerships, associations, companies, corporations, joint stock associations, trustees, receivers, agents, assignees and personal representatives.

Point of rest means that area on the terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned for the receipt of outbound cargo from shippers for vessel loading.

Port means a place at which a common carrier originates or terminates (by transshipment or otherwise) its actual ocean carriage of cargo or passengers as to any particular transportation movement.

Project rates means rates applicable to the transportation of materials and equipment to be employed in the construction or development of a named facility used for a major governmental, charitable, manufacturing, resource exploitation and public utility or public service purpose, including disaster relief projects.

Proportional rates means rates or charges assessed by a common carrier for transportation services, the application of which is conditioned upon a prior or subsequent movement.

Publication date means the date a tariff or tariff element is published in a carrier's or conference's tariff.

Publisher means an organization authorized to publish or amend tariff information.

*Rate m*eans a price stated in a tariff for providing a specified level of transportation service for a stated cargo quantity, from origin to destination, on and after a stated effective date or within a defined time frame.

Retrieval means the process by which a person accesses a tariff via dial-up telecommunications or a network link and interacts with the carrier's or publisher's system on a transaction-by-transaction basis to retrieve published tariff matter.

Rules means the stated terms and conditions set by the tariff owner which govern the application of tariff rates, charges and other matters.

Scope means the location group(s) (geographic groupings(s)) listing the ports or ranges of ports to and from which the tariff's rates apply.

Shipment means all of the cargo carried under the terms of a single bill of lading.

Shipper means:

(1) A cargo owner;

(2) The person for whose account the ocean transportation is provided;

(3) The person to whom delivery is to be made;

(4) A shipper's association; or

(5) An NVOCC that accepts responsibility for payment of all charges applicable under the tariff or service contract.

Shippers' association means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

Special permission means permission, authorized by the Commission, for certain tariff publications that do not conform with applicable regulations, usually involving effectiveness on less than statutory notice.

Tariff means a publication containing the actual rates, charges, classifications, rules, regulations and practices of a common carrier or a conference of common carriers. The term "practices" refers to those usages, customs or modes of operation which in any way affect, determine or change the transportation rates, charges or services provided by a common carrier or conference and, in the case of conferences, must be restricted to activities authorized by the basic conference agreement.

Tariff number means a unique 3-digit number assigned by the publisher to distinguish it from other tariffs. Tariffs may be identified by the 6-digit organization number plus the user-assigned tariff number (e.g., 999999-001) or a Standard Carrier Alpha Code ("SCAC") plus the user-assigned tariff number.

Tariff rate item ("TRI") means a single freight rate, in effect on and after a specific date or for a specific time period, for the transportation of a stated cargo quantity, which may move from origin to destination under a single specified set of transportation conditions, such as container size or temperature.

TRI number means a number that consists of the numeric commodity code, if any, and a unique numeric suffix used to differentiate TRIs within the same commodity description. TRI numbers are not required in systems that do not use numeric commodity coding.

Through rate means the single amount charged by a common carrier in connection with through transportation.

Through transportation means continuous transportation between points of origin and destination, either or both of which lie beyond port terminal areas, for which a through rate is assessed and which is offered or performed by one or more carriers, at least one of which is a common carrier, between a United States point or port and a foreign point or port.

Thru date means the date after which an amendment to a tariff element is designated by the publisher to be unavailable for use and the previously effective tariff element automatically goes back into effect.

Time/volume rate means a rate published in a tariff which is conditioned upon receipt of a specified aggregate volume of cargo or aggregate freight revenue over a specified period of time.

Trade name means a name used for conducting business, but which is not necessarily its legal name. This is also known as a "d/b/a" (doing business as) name.

Transshipment means the physical transfer of cargo from a vessel of one carrier to a vessel of another in the course of all-water or through transportation, where at least one of the exchanging carriers is an ocean common carrier subject to the Commission's jurisdiction.

UNION PACIFIC RAILROAD COMPANY
(UPRR)

[Union Pacific Logo]

Master Intermodal Transportation Agreement
(Formerly known as UP Exempt Circular 20-B)

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SECTION 1. GENERAL RULES AND POLICIES

ITEM 1.1: GENERAL RULES

A. Definitions for any capitalized terms used in this Master Intermodal Transportation Agreement (MITA) are set forth in Appendix A hereto. Additional Intermodal Shipment definitions can be found at: http://www.uprr.com/customers/intermodal/integlos.shtml

B. The terms and conditions contained in this document apply to all Intermodal Units tendered to UPRR for transportation over its lines.

C. Where any reference is made in individual Intermodal documents, which shall include but is not limited to bills of lading, waybills, transportation agreements, letter quotes or special commodity quotes (SCQ's) to UP Exempt Circular 20-B, or Southern Pacific Lines Intermodal Circular 1000 (SP 1000), then effective with the effective date of this document, it will be understood to mean Union

Pacific Railroad Company's (UPRR) Master Intermodal Transportation Agreement (MITA).

D. This MITA and any agreements, price documents or contracts that reference this MITA have been made under 49 U.S.C. § 10709 whereby UPRR or any rail carrier party to any agreement, price document or contract referencing this MITA will provide the Beneficial Owner, Shipper or Customer, with rail transportation and other services outlined herein in exchange for the applicable prices and any charges. This MITA may not be modified by any notations made on shipping documents. Any changes to this MITA must be approved in writing prior to the issuance of any shipping document.

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ITEM 3.2: CARMACK LIABILITY

49 U.S.C. Section 11706 provides for full-value liability and other liability terms for UPRR and the Shipper. In order for a Shipment to be subject to the terms of 49 U.S.C. Section 11706 it must comply with all of the following provisions:

A. Shipper must notify UPRR's Damage Prevention Department in writing to the above address, or via fax at (402) 271-5191, no less than 5 working days in advance of the Shipment being In-Gated at the Intermodal Terminal that the Shipper chooses Carmack liability protection, and

B. On Shipments that Shipper requests full-vaule (Carmack) liability protection Shipper must prepay the Carmack rate. The Carmack rate will be the Freight All Kinds (FAK) rate multiplied by 250%. This Carmack rate will

apply unless special written pricing authority is obtained by contacting its UPRR Marketing and Sales Representative or Damage Prevention Services (see Item 3.1 (E 4)). Failure by Shipper to provide a written agreement, prior to the Shipment being In-gated at the Intermodal Terminal or interchanged from a Connecting Carrier, evidencing that UPRR has agreed to provide Carmack Liability for any specified Shipment shall relieve UPRR from any obligation in excess of the liability limits set forth in Item 3.1 CARGO LOSS AND DAMAGE PROVISIONS.

C. Carmack Liability protection is not available for Shipments moving under FAK rates.

D. Carmack liability coverage is not available for any Shipments that originate outside the borders of the United States of America.

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ITEM 7.7: DEFINITION OF DOMESTIC AND INTERNATIONAL SHIPMENTS

A. Specific to Domestic Shipments:

1. Domestic traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party that incorporate the terms and provisions of this MITA.
2. Domestic traffic is rail traffic that originates and/or terminates in the continental United States.

B. Specific to International Shipments:

1. International traffic is U.S. Intermodal rail traffic involving an immediate prior or subsequent ocean movement.

2. International traffic shall be rated in accordance with prices so identified in individual contracts or pricing documents to which UPRR is a party. Unless otherwise agreed, international rates given to ocean carriers apply on international traffic moving on their Ocean Bill of Lading and in their specific owned or leased Containers. Any other traffic cannot be moved under these rates.
3. Shipments, which are warehoused, processed, repackaged, etc., prior or subsequent to rail movement will not be considered international traffic and shall be rated as domestic Shipments.
4. Mixed Shipments of domestic traffic and international traffic shall be rated as domestic traffic.
5. Shipments from or to Hawaii, Puerto Rico, Alaska and Guam will be considered international traffic.
6. Customer or its Agent will perform, at Shippers expense, Intermodal Terminal ramping at origin and destinations not located on UPPR.
7. Rates do not include any charge, which may be incurred prior to Interchange on import Shipments or following Interchange on export Shipments.
8. Unless otherwise provided, rates applicable to international border crossings, inclusive of Through Rates to and from Canada and Mexico, do not include: brokerage fees, in-bond preparation; export, import or manifest declaration of messenger services. Shipper

is responsible for all ancillary and related charges for the movement of the Shipment.

9. In the event UPRR determines that domestic Shipments are being billed by Receiver or Shipper under rates applicable only on international Shipments, UPRR shall ASSESS A SURCHARGE of One Thousand dollars ($1,000.00) for each Intermodal Unit so billed. This surcharge will be assessed whether the Intermodal Unit has been shipped or is awaiting shipment by UPRR. This surcharge will be billed to the party submitting rail billing to UPRR. UPRR reserves the right to cancel any rate(s) in contracts or pricing documents on one (1) days notice for improper application by a party.

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